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IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SOUTHERN OREGON COMPANY
DEFENDANT AND APPELLANT

VS.

UNITED STATES OF AMERICA
COMPLAINANT AND APPELLEE

Appellant's Brief on the Law

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STATEMENT OF CASE

This is a suit in equity to declare a forfeiture. Without challenging the jurisdiction of the Court as a court of equity to entertain a suit to declare a forfeiture, we proceed directly to the consideration of the relief demanded and the reasons given for making the demand.

The Issue.

I.

It is alleged in the Bill of Complaint and is admitted by defendant that: One March 3rd, 1869, Congress passed the following Act:

"An Act granting Lands to the State of Oregon to Aid in the Construction of a Military Wagon Road from the Navigable Waters of Coos Bay to

Roseburg in said State," which said Act was approved by the President of the United States upon said 3rd day of March, A. D. 1869, and is in terms as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that there be, and hereby is, granted to the State of Oregon, to aid in the construction of a military wagon road from the navigable waters of Coos Bay to Roseburg, alternate sections of public lands, designated by odd numbers, to the extent of three sections in width on each side of said road: *Provided,* That the lands hereby granted shall be exclusively applied to the construction of said road and to no other purpose, and shall be disposed of only as the work progresses: *Provided further,* That the grant of lands hereby made shall be upon the condition that the lands shall be sold to any one person only in quantities not greater than one-quarter section, and for a price not exceeding two dollars and fifty cents per acre: *And provided further,* That any and all lands heretofore reserved to the United States, or otherwise appropriated by act of Congress or other competent authority, be, and the same are hereby, reserved from the operation of this Act, except so far as it may be necessary to locate the route of said road through the same, in which case the right of way to the width of one hundred feet is granted: *And provided further,* That the grant hereby made shall not embrace any mineral lands of the United States, or any lands

to which homestead or pre-emption rights have attached.

"Sec. 2. And be it further enacted, That the lands hereby granted to said State shall be disposed of by the Legislature thereof for the purpose aforesaid, and for no other; and the said road shall be and remain a public highway for the use of the Government of the United States, free from tolls or other charges upon the transportation of any property, troops, or mails of the United States.

"Sec. 3. And be it further enacted, That said road shall be constructed with such width, graduation, and bridge as to permit of its regular use as a wagon road, and in such other special manner as the State of Oregon may prescribe.

"Sec. 4. And be it further enacted, That the State of Oregon is authorized to locate and use in the construction of said road an additional amount of public lands, not previously reserved to the United States nor otherwise disposed of, and not exceeding six miles in distance from it, equal to the amount reserved from the operation of this Act in the first section of the same, to be selected in alternate odd sections, as provided in section first of this Act.

"Sec. 5. And be it further enacted, That lands hereby granted to said State shall be disposed of only in the following manner, that is to say, when the Governor of said State shall certify to the Secretary of the Interior that ten continuous miles of said road are completed then a quantity of the land

hereby granted, not to exceed thirty sections, may be sold, and so on from time to time, until said road shall be completed; and if said road is not completed within five years no further sale shall be made, and the lands remaining unsold shall revert to the United States: *Provided, however,* That the entire amount of public land granted by this act shall not exceed three sections per mile for each mile actually constructed.

"Sec. 6. And be it further enacted, That the United States Surveyor General for the District of Oregon shall cause said lands, so granted, to be surveyed at the earliest practicable period after said State shall have enacted the necessary legislation to carry this Act into effect."

II.

On June 18th, 1874, Congress passed the following Act:

"An Act to authorize the issuance of patents for lands granted to the State of Oregon in certain cases," which said Act was approved by the President of the United States upon said 18th day of June, A. D. 1874, and is in terms as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in all cases when the roads in aid of the construction of which said lands were granted are shown by the certificate of the Governor of the State of Oregon, as in said Act provided, to have been constructed and completed, pat-

ents for said lands shall issue in due form to the State of Oregon, as fast as the same shall, under said grants, be selected and certified, unless the State of Oregon shall by public act have transferred its interests in said lands to any corporation or corporations, in which case the patents shall issue from the General Land Office to such corporation or corporations upon their payment of the necessary expenses thereof: *Provided,* That this shall not be construed to revive any land grant already expired nor to create any new rights of any kind except to provide for issuing patents for lands to which the State is already entitled."

III.

On October 22nd, 1870, the Legislative Assembly of the State of Oregon passed the following Act:

"An Act donating certain lands to the Coos Bay Wagon Road Company," which said Act was approved by the Governor of the State of Oregon upon said 22nd day of October, A. D. 1870, and is in terms as follows:

"Be it enacted by the Legislative Assembly of the State of Oregon,

"Section 1. That there is hereby granted to the Coos Bay Wagon Road Company all lands, rights of way, privileges, and immunities heretofore granted or pledged to this State by the Act of Congress, in this Act heretofore recited for the purpose of aiding said company in constructing the road mentioned and described in said Act of Congress,

upon the conditions and limitations therein prescribed.

"Section 2. There is also hereby granted and pledged to said company all moneys, lands, rights, privileges and immunities which may be hereafter granted to this State to aid in the construction of such road for the purposes, and upon the conditions and limitations mentioned in said Act of Congress, or which may be mentioned in any further grants of money or lands to aid in constructing such road.

"Section 3. Inasmuch as there is no law upon this subject at the present time this Act shall be in force from and after its passage."

IV.

That on April 30th, 1908, Congress passed the following Joint Resolution:

"That the Attorney General of the United States be, and he hereby is, authorized and directed to institute and prosecute any and all suits in equity, actions at law, and other proceedings which he may deem adequate and appropriate to enforce any and all rights and remedies of the United States of America in any manner arising or growing out of or pertaining to either or any of the following described Acts of Congress, to-wit: * * * *; also 'An Act granting lands to the State of Oregon to aid in the construction of a military wagon road from the navigable waters of Coos Bay to Roseburg, in said State,' approved March third, eighteen hundred and sixty-nine; * * * , including all rights

and remedies in any manner relating to the lands, or any part thereof, granted by either or any of said Acts; and in and by any and all such suits, actions, or proceedings the Attorney General shall, in such manner as he shall deem appropriate, assert all rights and remedies existing in favor of the United States relating to the subject of such suits, actions and proceedings, including the claim on behalf of the United States that the lands granted by each of said Acts respectively, or any part thereof, have been and are forfeited to the United States by reason of any breaches or violations of any of the terms or conditions of either or any of said Acts which may be alleged and established in any such suits, actions, or proceedings; it not being intended hereby to determine the right of the United States to any such forfeiture or forfeitures, but it being intended to fully authorize the Attorney General in and by such suits, actions, or proceedings to assert on behalf of the United States and the court or courts before which such suits, actions, or proceedings may be instituted or pending, to entertain, consider, and adjudicate the claim and right of the United States to such forfeiture or forfeitures, and if found to enforce the same: *Resolved further,* that the authority and direction hereinbefore given shall extend to any and all suits, actions, or proceedings which may be instituted or pending under the authority of the Attorney General at the time of the adoption and approval hereof."

V.

That the Coos Bay Wagon Road Company built the road provided for by said Act of Congress of March 3rd, 1869, and completed the same prior to October 21, 1872. That the Governor of the State of Oregon on December 10th, 1870, September 19th, 1872, and October 4th, 1872, duly certified to the Secretary of the Interior the completion of the road by sections, and that following said certificate of the Governor patents were issued and delivered to the Coos Bay Wagon Road Company as follows:

Patent No. 1, dated February 12, 1875, embracing 42,496.93 acres;

Patent No. 2, dated March 18, 1876, embracing 1,080.00 acres;

Patent No. 3, dated November 8, 1876, embracing 61,111.53 acres;

Patent No. 4, dated February 17, 1877, embracing 431.65 acres.

The lands patented as aforesaid aggregate 105,-120.11 acres.

VI.

That the Coos Bay Wagon Road Company prior to May 31st, 1875, sold 6,963 acres of the land embraced in the grant to approximately 53 purchasers, but no complaint is made about these sales and the recital in the bill is merely a part of the history of the grant.

VII.

That on May 31st, 1875, the Coos Bay Wagon

Road Company sold all the granted lands (except said 6,963 acres), and being about 96,676.96 acres, to John Miller.

VIII.

That by *mesne* conveyances (alleged in the Bill to be in "evasion of the law," "in violation of the terms of the grant," etc.) from said John Miller, the defendant Southern Oregon Company succeeded to the title of record of the Coos Bay Wagon Road Company.

IX.

The complaint is found in the printed Abstract from pages 2 to 139. The various transactions, transfers and conveyances with reference to these lands from May 31st, 1875, down to the time of filing the Bill in this suit are set out on pages 10 to 32 of said record. Eliminating much extravagant and irresponsible averment from the narrative, the chain is sufficiently accurate for a proper understanding of the Government's claim and its weakness.

The theory of the Government's case at the time of the filing of the complaint and trial in the lower court, was that the grant made by the Act of March 3rd, 1869, was a grant *upon condition subsequent;* that there had been a breach of condition, and the Government asked for a forfeiture because of the breach.

It was on this theory that the case was argued before Judge Wolverton January 28th, 1915. On

June 21st, 1915, the Supreme Court decided the case of the United States vs. O. & C. R. R. Company, et al., where a similar provision in a grant was held *not* to constitute a condition but *was* a covenant merely (35 Sup. Ct. Rep. 908). On July 12th, 1915, Judge Wolverton decided the present case in favor of the Government and against the defendant. It is true that in no part of his opinion does he hold that the proviso is *not* a condition but he does quote and adopt the following portion of the opinion of the Supreme Court in the O. & C. case: "Our conclusuions then on the contentions of the Government and the Railroad Company are that the provisos are not conditions subsequent; that they are covenants and enforceable."

Judge Wolverton follows this excerpt with the statement: "What is there said is applicable here and amply disposes of the contentions advanced without further reasoning or comment." (Page 201, Abstract of Record.)

Following this opinion, the Court entered its final decree December 7th, 1915, as follows:

In the District Court of the United States for the District of Oregon.

No. 3701.

United States of America, Complainant,

vs.

Southern Oregon Company, Defendant.

This cause having come on to be heard upon the pleadings and the evidence, was argued and sub-

mitted by counsel for the respective parties, and the Court being now fully advised in the premises, orders, adjudges and decrees as follows:

1. That the defendant and its officers and agents be and each is hereby enjoined from selling the lands or any part thereof, or any of the timber thereon, granted by the Act of Congress, approved March 3, 1869, and described in Exhibit H attached to the Bill of Complaint in this case, in quantities greater than one-quarter section to one person, or for a price exceeding $2.50 per acre; and from selling any of the timber on said lands, or any mineral or other deposits therein, except as part of and in conjunction with the land on which the timber stands or in which the mineral or other deposits are found, and from cutting or removing, or authorizing the cutting or removal of any of the timber thereon, or from removing or authorizing the removal of mineral or other deposits therein, except in connection with the sale of the land bearing the timber or containing the mineral or other deposits.

2. That the defendant and its officers and agents be, and each is, hereby enjoined, from making or agreeing to make, either directly or indirectly, any disposition whatsoever of said lands or of any part thereof or of the timber thereon, or any part thereof; or of any mineral or other deposits therein; from cutting, removing or authorizing the cutting or removal of the timber thereon or any part thereof; and from removing or authorizing the removal of mineral or other deposits therein, until Congress

shall have a reasonable opportunity to make provision by legislation for the disposition of said lands, timber, mineral or other deposits, in accordance with such policy as Congress may deem fitting under the circumstances and at the same time secure to the defendant all the value that the granting act conferred upon the State of Oregon, or the Wagon Road Company.

3. That if Congress does not make provision for the disposition as aforesaid of said lands, timber, mineral or other deposits the defendant may apply to the court within a reasonable time, but not less than eight months from the entry of this decree, for a modification of so much of the injunction herein ordered as forbids any disposition of said lands or money, timber, mineral or deposits, or any part thereof, until Congress shall act, and the court hereby reserves the right to modify this decree in that regard, if, in its opinion, good cause shall then exist for doing so.

4. That the complainant have and recover from the defendant, Southern Oregon Company, its lawful costs and disbursements herein, taxed at $1,095.54, and that execution issue therefor.

5. That the complainant shall have the right to apply to the court at any time hereafter for an accounting as to all moneys received by the defendant from or on account of the lands covered by said granting act, and the court retains jurisdiction over the action for the purpose of granting such application if good cause therefor appears.

THE OREGON & CALIFORNIA RAILROAD COMPANY CASE

The case at bar differs in several respects from the Oregon & California Railroad Company case.

First. In the O. & C. case, the grant was to a corporation not in existence but to come into existence. In the present case the grant is to the State.

Second. In the O. & C. case, because of this fact and the further fact that the proviso alleged to be a *condition* was not in the original grant of July 25, 1866, but in a joint resolution of April 10, 1869, there was a question as to when the grant took effect. Here there is no question. The grant involved in this suit under all the authorities was *in praesenti,* and upon the completion of the road took effect as of date of the grant, March 3, 1869.

Third. In the O. & C. case the title remained in the original grantee in the patent—the railroad company. In the present suit title is in Southern Oregon Company, the fourth transferee from the original patentee.

The whole controversy here revolves around the Second Proviso in the Granting Act of 1869,—"*Provided further,* that the grant of lands hereby made shall be upon the condition that the lands shall be sold to any one person in quantities not greater than one-quarter section and for a price not exceeding $2.50 per acre."

The Government claimed in its Bill and at the trial in the lower court that this proviso created a *condition subsequent* and a failure to observe its terms entitled the grantor to demand a forfeiture of the grant. What its claim will be here we are not advised.

DEFENDANT INSISTS:

I.

Section 5 and the first and second proviso of Section 1 of the Act must be read together; and, when so read, it is apparent that the second proviso above quoted referred only to sales made during the first five years, as the Act has provided in Sections 1 and 5, and was not intended to apply to sales made *after* the road was completed and accepted.

II.

Even conceding that this proviso was intended to apply to all sales whenever made, it is a matter of contract, a covenant only, the observance or non-observance of which depends on the good faith of the State, and that it is not and cannot be considered a *"condition subsequent,"* nor is it an enforcible covenant against the Southern Oregon Company.

III.

Defendant, Southern Oregon Company, is a *bona fide* purchaser of the lands, title to which the Government now seeks to forfeit.

IV.

The Government is estopped to now urge the forfeiture of this title for breach of condition or failure to observe the covenant, because of the four suits heretofore brought by the Government against these defendants and other defendants. (Exhibits 240, 241, 242 and 243.)

V.

This being a grant to the State and the State having earned the lands by complete construction of the road, the Government cannot follow the lands and direct the disposition of them by the State.

VI.

The proviso in the first section of the Act, whether construed as a condition or covenant, is obnoxious to the grant—the grant will be upheld and the restrictions of the proviso will fall.

The Decree entered in the court below was patterned after the final decree in the O. & C. case. While the proviso in the Joint Resolution of April 10, 1869, over which the controversy arose in the O. & C. case, is similar to the proviso in the Coos Bay Wagon Road Grant, yet the two are not identical. Set opposite each other the difference between them is apparent:

O. & C. Grant	Coos Bay Wagon Road Grant
"And provided further, that the lands granted by the Act aforesaid shall be sold *to actual settlers only* in quantities not greater than one-quarter section to one purchaser, and for a price not exceeding $2.50 per acre."	"Provided, further, that the grant of lands hereby made shall be upon the condition that the lands shall be sold to any one person only in quantities not greater than one-quarter section, and for a price not exceeding $2.50 an acre."

In the opinion of the Supreme Court in the O. & C. case importance is attached to the limitation of sale to "actual settlers only," and the theory is worked out that because of these words the settlement of the country and not the building of the road was the paramount purpose of the grant, and that this restriction evidenced a policy "more dominant in purpose than the building of the road."

No such claim can be made here. Actual settlement on these lands was neither provided for nor contemplated. As a matter of fact, with the exception of about one-tenth of the grant, settlement was, and is, impossible. No controversy over the meaning of the term "actual settlers" arises here. The question of governmental policy looking to encouraging settlers to go upon the land and settle up the country to which so much importance was attached in the O. & C. case, has no application here in mea-

suring the restraint upon alienation contained in the proviso in the Coos Bay Grant.

ARGUMENT

In view of this record and the decision of the Supreme Court of the United States in the case of the United States vs. O. & C. Railroad Company, (35 S. C. R. 908-925), it would seem to be unnecessary to discuss herein the question of "condition" or "covenant" as applied to the Act of March 3, 1869. While there are material differences, as stated above, between the two cases, yet the proviso in the Act of April 10, 1869 (the O. & C. case) is similar to the proviso here under examination.

If the proviso in the O. & C. case did not create a condition subsequent, clearly the proviso here does not, so that this suit originally begun to claim a forfeiture of the entire title for *breach of condition* has been changed entirely and is now in effect a suit to enforce a *negative covenant* by injunction. In determining whether a clause in a grant is to be construed as a condition or a covenant, there are some definite principles which are so generally recognized by the courts that we may consider them settled law. Among them are:

I.

When the language of a grant raises a doubt as to whether the provision is intended as a condition

or a covenant, the court will resolve the doubt in favor of the grantee and will hold it to be a covenant.

II.

While the words "upon condition," etc., are apt words to create a condition subsequent and may evidence one, yet they do not always, or necessarily do so. The same words may be employed to express a covenant or create a condition; and if there is any doubt regarding the intention of the grantor or devisor, courts will incline towards the former construction—for conditions which tend to destroy estates are not favored and are strictly construed. In U. S. vs. O. & C. R. R. Co., 186 Fed. 899, Judge Wolverton said:

"Some general observations concerning conditions subsequent may be made in passing. They are not favored in law, and ordinarily are amenable to strict construction, for the reason that, if not observed according to their tenor, they entail forfeiture and a destruction of the estate. A mere declaration touching the particular purposes for which the grant is made, or that the grantee is to do or not to do certain things, will not evidence a condition. And, generally speaking, a condition in a grant should be created by apt and appropriate words—words which *ex proprio vigore* import a condition. Furthermore, if there be doubt as to whether the words create a condition subsequent, or a covenant, the breach of which may be compensated in dam-

ages, courts will construe them favorably to the latter.

"Instances are not wanting, however, where words and terms appropriate to create a condition when read in connection with the context of the grant and the intention of the parties, have been disregarded in their technical sense, and construed as in harmony with a covenant, and conversely, the decision depending upon the real purpose and intent of the parties to the grant, as gathered from the manner and purpose of the conveyance and from the instrument itself, read in its entirety. And it has been held that, although a deed or conveyance contain a clause declaring the purpose for which it is intended the granted premises shall be used, if such purpose will not inure specially to the benefit of the grantor, but is in its nature general and public, and if there are no words in the grant indicating an intent that the grant is to be void if the declared purpose is not fulfilled, such a clause is not a condition subsequent." Vol. 6 Am. and Eng. Cycl. Law, page 502; 4 Kent's Commentaries (13 Ed.), page 132.

In United States vs. New York Indians, 170 U. S., page 25 (18 Supreme Court Reporter, page 537), the Supreme Court said:

"A condition when relied upon to work a forfeiture, is construed with great strictness. The grantor must stand on his legal rights, and any ambiguity in his deed, or defect in the evidence

offered to show a breach, will be taken most strongly against him, and in favor of the grantee. A condition will not be extended beyond its express terms by construction. The grantor must bring himself, within these terms, to entitle him to a forfeiture. (Jones, Real Prop., Sections 678, 679.)"

It was claimed by counsel for the Government in the lower court and will be here, that "in construing government grants such as the one under consideration, all doubts must be resolved in favor of the grantor." Within the scope of its proper application this doctrine may be admitted. The grant, truly, is to be construed against the grantee, but in defining the sweep of the inhibition contained in a restrictive proviso the rule is the reverse. In Kiefer vs. German American Seminary, 46 Mich., page 639, Judge Cooley clearly states the doctrine and defines its limitations thus: "The general rule undoubtedly is, that public grants are to be construed strictly as against the grantees. United States vs. Arredondo, 6 Pet. 691; Charles River Bridge vs. Warren Bridge, 11 Pet. 544; Martin vs. Waddell, 16 Pet. 367; Dubuque, etc., R. R. Co. vs. Litchfield, 23 How. 66; Baltimore vs. Railroad Co., 21 Md. 50; Bradley vs. Railroad Co., 21 Conn. 294; Richmond vs. Railroad Co., 21 Grat. 614; DeLancey vs. Ins. Co., 52 N. H. 581; La Plaisance Bay Harbor Co. vs. Monroe, Walk. Ch. 155; Pennsylvania R. R. Co. vs. Canal Com'rs, 21 Penn. St. 22. The grantee shall take nothing which is not plainly granted, and as is said in the

case last cited, 'every resolution which springs from doubt is against' him. But there is no question in this case in respect to the grant; its terms are clear and precise and its extent undisputed; the controversy arises upon the terms of a restraint imposed by the grant, and which is in the nature of a condition subsequent, and tends to a defeat of the grant by way of forfeiture. *If the grant is to be construed strictly as against the grantees, the condition is to be construed strictly against the state;* and the state is entitled to enforce it only when a forfeiture would be fairly within the intent of the act whereby the grant was made. The purpose of construction is to give effect to an instrument; not to defeat it. Rice vs. Railroad Co., 1 Black 358; People vs. Burns, 5 Mich. 114; Tabor vs. Cook, 15 Mich. 322; and in a public grant especially, more than in any other, we should expect to find provisions looking to the permanent enjoyment of the right or property granted as against mere technical breaches of contract or condition on the part of the grantee, not tending to defeat the general purpose."

In United States vs. Denver & Rio Grande R. R. Co., 150 U. S. 14, this Court said:

"It is undoubtedly, as urged by the plaintiffs in error, the well-settled rule of this court that public grants are construed strictly against the grantees, but they are not to be so construed as to defeat the intent of the legislature, or to withhold what is given either expressly or by necessary or fair impli-

cation. In Winona & St. Peter Railroad vs. Barney, 113 U. S. 618, 625, Mr. Justice Field, speaking for the court, thus states the rule upon this subject: 'The acts making the grants * * * are to receive such a construction as will carry out the intent of Congress, however difficult it might be to give full effect to the language used if the grants were by instruments of private conveyance. To ascertain that intent we must look to the condition of the country when the acts were passed, as well as to the purposes declared on their face, and read all parts of them together.'

"Looking to the condition of the country, and the purposes intended to be accomplished by the act, this language of the court furnishes the proper rule of construction of the Act of 1875. When an act, operating as a general law, and manifesting clearly the intention of Congress to secure public advantages, or to subserve the public interests and welfare by means of benefits more or less valuable, offers to individuals or to corporations as an inducement to undertake and accomplish great and expensive enterprises or works of a quasi public character in or through an immense and undeveloped public domain, such legislation stands upon a somewhat different footing from merely a private grant, and should receive at the hands of the court a more liberal construction in favor of the purposes for which it was enacted. Bradley vs. New York & New Haven Railroad, 21 Connecticut, 294; Pierce on Railroad, 491."

Morrill vs. Wabash St. L. & P. Ry. Co., 96 Mo. 174, 179.
Roanoke Investment Company vs. K. C. S. E. Ry. Co. 108 Mo. 50, 63.
Farnham vs. Thompson, 34 Minn. 330, 337.
Emerson vs. Simpson, 43 N. H. 475, 477.
Page vs. Palmer, 48 N. H. 385, 387.
Wier *et al.* vs. Simmons, 55 Wis. 637, 643.

In any examination to determine the true meaning of this proviso, it must be remembered, therefore, that the whole Act must be compared—its other provisions and its object. The paramount object of this legislation was the building of a *"Military wagon road from the navigable waters of Coos Bay to Roseburg."* No other object was mentioned—none was contemplated. The first proviso, "That the lands hereby granted shall be exclusively applied to the construction of the said road and shall be disposed of *only as the work progresses"* is as much a "condition" as the other. Whether it is a covenant or condition, however, or by whatever term we designate it, it shows quite clearly what Congress intended. *The road should be built.* The lands should be sold to accomplish *that* purpose and no other purpose. And when that purpose was accomplished the Government had no further interest in the lands nor in the disposal of them. It is a clear case of contract with the State. This is still more apparent from the fifth clause:

"And be it further enacted, that lands hereby

granted to said State shall be disposed of only in the following manner, that is to say, when the Governor of said State shall certify to the Secretary of the Interior that ten continuous miles of said road are completed, then a quantity of the land hereby granted, not to exceed thirty sections, may be sold; and so on from time to time, until said road shall be completed; and if said road is not completed within five years *no further sale shall be made, and the lands remaining unsold* shall revert to the United States."

The "lands remaining unsold shall revert to the United States"—*for non-completion of the road only.* Congress knew how to phrase a condition subsequent and to provide a penalty for breach. It would have been just as easy to put these words of reversion into the first section as into the fifth—and they would have appeared there if Congress had any idea of providing for the forfeiture demanded in this suit. And because they *do not* appear there the conclusion follows that they were *purposely omitted.*

There is in Section 5 a limitation on the *time* within which the road shall be completed. It is to be noted that while this section provides for the forfeiture of the *unsold lands,* that is, lands which the State has not sold in case the road is not completed in five years, there is no provision for the forfeiture of any lands *sold by the State up to that time*—whether the road is completed or not. It is

apparent that Congress intended to *confirm* all titles *where the State had sold* within five years, and this without reference to the completion of the road. Where, however, the State *had not sold,* the lands reverted to the United States. To illustrate: This road is sixty-three miles long. Suppose at the end of five years the State had completed fifty miles of it and such completion was certified by the Governor to the Secretary of the Interior—five sections, of ten miles each—and no more. Upon filing the Governor's certificates with the Secretary of the Interior, the State would receive title to 150 sections. The State sold, say, 75 of these sections before the five-year limitation expired, leaving 75 sections unsold and the road uncompleted. By the terms of Section 5 the title to the 75 sections *unsold* reverted to the United States, but there is no reversion of title as to the 75 sections *sold by the State.* The maxim *expressio unius,* etc., applies, and the *sold* lands would not be forfeited if the road never was completed. Indeed a fair reading of this whole Act *compels* the conclusion that all regulations and limitations had reference only to "sales" made during the time of the construction of the road. The "sales" *regulated* by the second proviso are the "sales" *referred to* in the first proviso.

The Government is in court here asking for a *strict* construction and demanding the extraordinary and drastic remedy of forfeiture. But a court of equity, if it entertains jurisdiction at all, will

be governed in granting relief by equitable principles and practices—and the Government's demand is inequitable. The Act does not pretend to regulate sales of this property *after completion of the road.* Both the provisos are limited to lands *"disposed of only as the work progresses"* and *"exclusively applied to the construction of said road and to no other purpose."* Does it need argument to show that lands cannot be "applied" to the "construction" of a road already constructed, or be "disposed of only as the work progresses"—after the work has been completed? These provisos in Section 1 are neither conditions nor covenants "running with the land," and counsel for the Government will not claim that they are. We quote the following statement of the law from the Government's brief in the Oregon & California Railroad Company's case in the District Court, on the argument of the demurrer:

"It may be suggested that Congress intended to make this provision a covenant running with the land. But a moment's consideration will demonstrate the fallacy of this. A covenant running with the land would be a permanent restriction upon the manner in which the lands might be sold or owned. The lands could never be sold except to actual settlers, in quantities not exceeding 160 acres, and for a price not exceeding $2.50 per acre. Congress did not intend to place a permanent restriction of that kind upon the industrial life of the community in which these lands are situated. It intended effect-

ively to regulate the primary disposition of the lands by the railroad company, but that was all. It intended to initiate healthful commercial and industrial conditions, but it did not presume to control the internal affairs of the State of Oregon for all time to come. Its authority to do so may well be questioned. It has never attempted to do so elsewhere, and to assume that it attempted to in this instance is opposed to the traditions of our national life and to every reasonable intendment of national legislation.

"If, as contended by the Government, Congress intended to restrain only alienation by the railroad company, a covenant running with the land was inappropriate."

And yet the Government asks the Court to decree that as to the Southern Oregon Company, the sixth in order of the holders of this title, the *second* proviso quoted above regulating sales *which could be made* is operative to regulate the terms and conditions of sales which the *first* proviso says *shall not be made at all.*

While it is true that in certain cases where a covenant is not one that "runs with the land," equity will take jurisdiction to enforce the covenant, yet these are all cases where the covenant relates in some way to the *use* of the land or subjects the land to certain *easements* or *servitudes.* In no case that we have found in the reports has it been held that a covenant such as this, which affects only the

manner of alienation, could be enforced against a holder of the title after it had passed out of the original grantee.

Covenants in order to run with the land must, however, relate to the interest or estate so that their performance or non-performance will affect the quality, value or mode of enjoyment of the estate.

8 A. & E. Ency. Law, 139.

All covenants are either real or personal. Those so clearly connected with the realty that their benefit or burden passes with the realty are construed to be covenants real; all others are personal.

11 Cyc. 1052.

Spencer's Case, 5 Coke, 16 (1 Smith's L. Cas. 68), is the leading case on the subject. In that case it was said: "Yet if the thing to be done be mere collateral to the land and doth not touch or concern the thing described in any sort" the assignee of the covenantor shall not be bound.

This suit is to declare a forfeiture—no other relief is asked for in the complaint. The Government claims that the proviso in Section I of the Act creates a condition subsequent—that there has been a breach, hence the complainant is entitled to take back the land.

The lower court holds that the proviso does not create a condition and therefore there is no forfeiture. The whole prayer of complainant's bill is de-

nied. A decree is entered, however, restraining the defendant from doing anything with the lands "until Congress shall have a reasonable opportunity to provide by legislation for their disposition in accordance with such policy as it may deem fitting under the circumstances and at the same time secure to the defendant all the value that the granting Act conferred upon the State and the Road Company. In case Congress makes no such provision within eight months defendant may apply to the court for such modification of the injunction as may seem appropriate."

The defendant has always claimed that this proviso in the Act was a covenant and that as against it, it was *not* enforecable, for many reasons set out in the answer. The court agrees that it is a covenant, but says that it *is* enforceable. If it is enforceable, the lower court should have enforced it. Suppose Congress does not act in the eight months provided in the decree, what then? We "may apply to the court for such modification of the injunction as may seem appropriate." The court will have no more authority then than it had when it made the decree. If it could do nothing towards enforcing this covenant when it made the decree, it cannot do anything at the end of eight months. If it can do it at the end of eight months, it could have done it at the time of the decree, and should have done so. We had always supposed, up to the time of the rendition of the decree in the O. & C. case, that an "enforceable covenant" meant one that was capable of enforcement

at the time it was made, or, at all events, at the time when suit was brought upon it, and that the question of whether it was enforceable or not was to be determined by the law in force at the time the question is presented to the court. But if it is proper to enjoin proceedings in a case until Congress or a State Legislature may pass a law to make an "enforceable covenant" capable of being enforced, we were evidently in error.

THE PROVISO IS REPUGNANT TO THE GRANT AND THEREFORE VOID

This proviso is a limitation on the right of alienation and is repugnant to the grant, and therefore, whether it be considered a covenant or an attempt to create a condition, is void. The testimony was that 90 per cent of the total area of the grant could not, at the date of the grant, nor for five years thereafter, have been sold in tracts of 160 acres or less *at any price.* This pretended condition was therefore repugnant to the grant and cannot be sustained.

An examination of the adjudged cases shows:

A.

That the courts uniformly hold that any condition obnoxious to the grant is void—the grant will be sustained and the attempted condition eliminated.

B.

Any provision attached to the grant of the fee

simple title whereby the right of alienation is suspended for *any* length of time is a provision obnoxious to the grant and is void—the complete title will pass free from the attempted limitation.

De Peyster vs. Michael, 6 N. Y. 467-492-293.
Mandlebaum vs. McDonnel, 29 Mich. 77-97.
Anderson vs. Carey, 36 Ohio State 506-575.
Case vs. Dwire, 15 N. W. 265-266.
Bennet vs. Chapin, Vol. 7, L. R. A. 377-381.
Lathiner vs. Waddell, 3 L. R. A., pages 668-678 (26 S. E. 122).
Potter vs. Couch, 141 N. S. 315.
Scovill vs. McMahan, 21 L. R. A. 58.
Vandershie vs. Hanks, 3 Cal. 28-41.
Burnham vs. Burnham, 79 Wis. 557.

In Case vs. Dwire, an Iowa case reported in 15 Northwestern Reporter, page 265, 60 Iowa 44, the court said:

"Here, then, is an absolute conveyance in fee simple with a condition inconsistent therewith. The deed and condition are in conflict. Which shall stand? The deed vested the fee-simple title absolute in the grantee. Any condition inconsistent therewith would, if enforced, defeat the deed. But the law will uphold the conveyance. The condition must, therefore, be inoperative. As the fee-simple title absolute is conveyed by the deed, the condition cannot be enforced, for it is inconsistent therewith."

In Anderson against Cary, 36 Ohio State Re-

ports, page 515, the court had for decision the scope of a certain devise in a will, to wit:

"Upon the following conditions: I direct that they, the said sons, shall not be allowed to sell and dispose of said farm until the expiration of ten years from the time my son, Charles Lincoln, arrives at full age, except to one another, nor shall either of my said sons have authority to mortgage or encumber said farm in any manner whatsoever, *except in the sale to one another as aforesaid.*"

In construing this clause the court said:

"Instead of giving to his sons an estate in the land less than a fee simple, his intent and purpose was to give them the fee simple, but to eliminate therefrom its inherent element of alienability, for a limited period, or to incapacitate his devisees, although *sui juris,* from disposing of their property for the same limited period, to wit: until the younger should arrive at thirty-one years of age—each and both of which purposes are repugnant to the nature of the estate devised.

"By the policy of our laws, it is of the very essence of an estate in fee simple absolute, that the owner, who is not under personal disability imposed by law, may alien it or subject it to the payment of his debts at any and all times; and any attempt to evade or eliminate this element from a fee simple estate, either by deed or by will, must be declared void and of no force."

De Peyster against Michael, 6 New York, page 467, is a leading case on this subject and we quote the following from pages 492 and 493:

"But it is a well-established principle that where an estate in fee simple is granted, a condition that the grantee shall not alien the land is void. Littleton says, 'Also, if a feoffment be made on this condition that the feoffee shall not alien the land to any, this condition is void; because when a man is enfeoffed of lands or tenements, he hath the power to alien them to any person by law. For if such a condition should be good, then the condition should oust him of all the power which the law gives him which should be against reason, and therefore such a condition is void.'

"Coke, in his commentary on this section, adds, 'And the like law is of a devise in fee upon a condition the devisee shall not alien, the condition is void; and so it is of a grant, release, confirmation, or any other conveyance whereby a fee simple doth pass.' (Co. Litt., 223a.) The language of Mr. Cruise is, 'A condition annexed to the creation of an estate in fee simple that the tenant shall not alien, is void and repugnant to the nature of the estate given; for a power of alienation is an incident inseparably annexed to an estate in fee simple.' (Cruise Dig. tit. 13, ch. 1, sec. 22.) The right of alienation passes by the grant of the fee as perfectly as if it were given by the express terms of the grant. Without such right the estate granted would be neither a fee simple nor any other estate known to the law. Lands

granted in fee on condition that the grantee shall not enjoy the lands, or shall not take the profits of the lands; or on condition that the heir of the grantee shall not inherit the lands; or on condition that the grantee shall not do waste, or on condition that his wife shall not be endowed, in all these and the like cases, the condition is void as repugnant to the estate. (Shep. Touchstone, 131.) 'A condition annexed to an estate given is a divided clause from the grant and therefore cannot frustrate the grant precedent, neither in anything expressed, nor in anything implied which is of the nature incident and inseparable from the thing granted.' (Hobart, 170.)

"The reason why such a condition cannot be made good by agreement or consent of parties is, that a fee simple estate and a restraint upon its alienation cannot in their nature co-exist. The ownership of the fee cannot exist in one person while the ownership of the right of alienation and of its fruit exists in a different person. This is a principle older than the common law of England. Grotius (Book 1, ch. 6, sec. 1) says, 'Since the establishment of property, men who are masters of their own goods, have by the law of nature the power of disposing of, or of transferring all or any part of their effects, to other persons; for this is the very nature of property; I mean of full and complete property'; and, therefore, Aristotle says, 'It is the definition of property to have in one's self the power of alienation'."

In Mandelbaum vs. McDonnel, 29 Mich. 97, the sourt said:

"Now, neither Littleton nor Coke, nor any of the annotators of Coke upon Littleton (so far as I have been able to discover) has mentioned any such qualification of the general rule laid down by Littleton in Sec. 360, nor anywhere intimated that such a condition against alienation for a particular time, or for a reasonable time, or for any time whatever, would be valid. And the same may be said of the other approved English works upon real estate; Blackstone's Commentaries, Sheppard's Touchstone, Bacon's Abridgement, Cruise's Digest, Comyn's Digest, and all other English works which I have been able to examine. And if there is any English decision since the statute *quia emptores,* where the point was involved, in which it was held competent for a feoffer, grantor or devisor of a vested estate in fee simple, whether in remainder or in possession, by any condition or restriction in the instrument creating it, to suspend all power of the feoffee, grantee, or devisee, otherwise competent, to sell, for a single day, I have not been able to find it."

The defendant has pleaded in its answer that this proviso in the Act of 1869 is repugnant to the grant, and read in the light of these authorities the testimony conclusively establishes the defense. It must be remembered that this grant was made *"to aid in the construction of"*—the road—"that the lands hereby granted shall be exclusively applied

to the construction of said road and to no other purpose, and shall be disposed of *only as the work progresses"* (page 3, printed Abstract). It is further provided in Section 5, page 5, printed Abstract, "and if said road is not completed within five years, no further sale shall be made and the lands remaining unsold shall revert to the United States."

To earn the grant, therefore, it was necessary to *complete the road* within five years—that is, on or before March 3, 1874. If the lands were to be of any use to "aid in the construction of the road" it is apparent they must be sold before March 3, 1874. If we have shown that during that time they could not have been sold "in 160-acre tracts" at *any* price, it goes without saying that Congress attached to the grant a provision, covenant, limitation, exception, condition or whatever we may choose to call it, which nullified the grant and made it valueless.

Eighteen witnesses were called by the defendant in support of the defendant's contention that these lands at the time of the grant and for many years thereafter could not be sold in 160-acre tracts at *any* price. For the Court's convenience, we call attention to the testimony of the following witnesses, found on pages indicated (printed Abstract):

LAND COULD NOT BE SOLD IN 160-ACRE TRACTS AT ANY PRICE

T. W. Newland, pages 222 to 224.

S. A. Gurney, page 243.

W. J. Coates, pages 244 and 245.

A. E. Bushnell, pages 245 to 247.

J. D. Benham, page 230.

W. Z. Cotton, pages 225 and 226. (Offered to sell to anyone who would pay for making out the deed.)

H. W. Halverstott, pages 232 and 233.

George Norris, pages 234 and 235.

Albert E. Bettis, pages 235 to 237.

William Bettis, pages 237 and 238.

J. P. Stemler, pages 224 and 225. (Timber a nuisance.)

J. C. Haynes, pages 238 to 240.

R. E. Rose, pages 240 and 241.

John F. Hall (has been County Judge in Coos County for eight years; was County Surveyor from 1887 to 1896; came into Coos County in 1869, has remained there ever since), pages 226 and 227.

L. D. Smith, pages 227 and 228.

T. J. Klinkinbeard, pages 241 and 242.

Robert E. Shine, deposition, pages 294 to 297.

A. M. Simpson, deposition, page 396.

Each of these witnesses testified that for at least five years, and in fact for twenty years after the grant, the great body of this land could not have been sold for any sum in 160-acre tracts.

We have quoted from this testimony on pages

49 to 60 of our brief on the facts, and submit that it conclusively shows that for at least five years after this grant was made 90 per cent of the lands could not be sold in 160-acre tracts *at any price.*

Of course this testimony does not apply to the lands along the creeks and streams and contiguous to the sloughs—Isthmus, Catching, etc. This portion of the grant was valuable, but its area was limited, a very small percentage of the whole grant consisting of bottom lands. This clearly appears from the testimony of the following ten witnesses:

PERCENTAGE OF BOTTOM LAND WHICH WAS VALUABLE FOR CULTIVATION AND HILL AND TIMBER LAND NOT SUSCEPTIBLE TO SETTLEMENT:

S. A. Gurney, page 243. Estimates bottom land 1/10.

W. J. Coates, pages 244 and 245. Estimates bottom land 1/10.

A. E. Bushnell, page 246. Estimates 1 acre on 160.

Geo. S. Gothro, page 319. Estimates 1 to 3 per cent.

D. J. Thrift, County Assessor, page 229. Estimates 3000 acres on whole grant, half a township, barren and of no value at any time.

W. Z. Cotton, page 225. Not over 20 per cent.

George Norris, page 234. Estimates 25 per cent.

J. E. Rose, page 240. Estimates it as very little —bottom land very small portion of grant. Balance

of grant being hills, precipitous, rocky and broken.

T. J. Klinkenbeard, page 242. Ten per cent would certainly cover it.

L. D. Smith, page 228. So small could not make guess.

As further illustrating, we call the Court's attention to Exhibit "A" of the Bill of Complaint, (pages 36 to 41, printed Abstract). This is a schedule of all lands sold by the Coos Bay Wagon Road Company up to May 31, 1875—6963 acres. This schedule shows that *all* these lands lie in Township 26 South, Ranges 12 and 13 West, and Township 27 South, Ranges 12 and 13 West, except 40 acres in Section 9, Township 28 South, Range 7 West (a small piece in Looking Glass Valley). A reference to the map (Defendant's Ex. 218, page 302, printed Abstract) shows that Townships 26 and 27 South are on Coos Bay, and *all* this land lies adjacent to the tide waters and the sloughs above mentioned. These were the only sales because no other land could be sold at any price.

In further explanation of this testimony and supplementing it, we show that while within the exterior limits of the grant there were a number of valleys and considerable area of agricultural land available for settlement, yet practically all of this land had been settled upon prior to the grant, and therefore never became the property of Coos Bay Wagon Road Company. On this point we ask the Court's attention to the following testimony:

LAND IN VALLEYS ALL TAKEN UP

T. H. Coates, page 245.
A. E. Bushnell, page 246.

This testimony is conclusive and satisfies the mind that at the time of the grant, March 3, 1869, and for many years thereafter, the land embraced in the grant, being what was left after the settlement on the land in the valleys described by Coates and Bushnell, because of its character and location, could not be sold in 160-acre tracts to anyone at any price.

If the reading of the testimony left any doubt in our mind, an examination of the records of the Roseburg Land Office would set that doubt at rest. We call the Court's attention to exhibits from one to fourteen. These are maps of the lands embraced in the grant, made from the Land Office records and the original exhibits are sent to this Court by order of the lower court. These exhibits, taken together, constitute a complete record of the Government's *even* sections within the boundaries of the grant. For the Court's convenience we have tabulated the results deducible from these exhibits and present them herewith. They are identified by H. O. Pargeter (page 315, printed Abstract), and the showing by townships is tabulated on pages 62 to 96, Brief of Facts. We quote from page 96, Brief of Facts, the following:

SUMMARY BY TOWNSHIP AND RANGE

Number of Entries

Township	Range	Prior to 1875	Between 1875 and 1880	Between 1880 and 1890	Since 1890
28 South,	7 West	23	3	9	26
28 South,	8 West	10	3	5	52
29 South,	8 West	4	4	9	23
28 South,	9 West	..	..	..	65
29 South,	9 West	2	2	2	35
28 South,	10 West	..	3	4	47
29 South,	10 West	..	..	1	22
27 South,	11 West	..	3	17	28
28 South,	11 West	..	6	17	51
26 South,	12 West	14	20	26	25
27 South,	12 West	5	12	26	35
28 South,	12 West	15	10	24	38
26 South,	13 West	10	4	..	1
27 South,	13 West	29	12	9	1
		112	82	149	449

From an examination of this summary, the Court can at once see that the Government, within the limits of the grant, could not even give away its land.

An examination of the records of the State Land Department shows the same condition. Exhibit 216 is a certificate from the State Land Board as to the disposition of the school lands within the limit of the grant. The contents of this certificate are to be

found on pages 303 to 315, printed Abstract, and are summarized on page 98, Brief of Facts, as follows:

(And, first, we call the court's attention to a mistake in the printed record: Township 26 South, Range 12 West, appearing first on page 303, is duplicated on page 311; Township 28 South, Range 8 West, appearing first on page 309, is duplicated on page 312. This was an error in arranging matter for the printer. Outside of this, the list beginning on page 303 and extending to page 315 of the printed Abstract is correct.)

Arranging these Sections in a regular order beginning in Range 6 West, the Roseburg end of the Road, and running through Ranges 7, 8, 9, 10, 11, 12 and 13, the Coos Bay end of the Road, we get the following results

SUMMARY BY TOWNSHIP AND RANGE OF SCHOOL SECTIONS.

Number of Entries.

Range Township	Prior to 1875	Between 1875 and 1880	Between 1880 and 1890	Since 1890
6 West, 27 South.....	6	..	2	..
6 West, 28 South.....	3	2	1	..
7 West, 27 South.....	3	..	1	1
7 West, 28 South.....	5	2	3	..
7 West, 29 South.....	2	..	1	4
8 West, 27 South.....	2	..	..	4
8 West, 28 South.....	2	..	5	1
8 West, 29 South.....	1	1	1	6
9 West, 28 South.....	.	..	1	4
9 West, 29 South.....	2	..	8	..

Range	Township	Prior to 1875	Between 1875 and 1880	Between 1880 and 1890	Since 1890
10 West,	28 South	.	1	..	5
10 West,	29 South	.	..	5	..
11 West,	27 South	.	1	3	3
11 West,	28 South	.	1	9	3
12 West,	25 South	2	..	3	5
12 West,	26 South	2	1	3	5
12 West,	27 South	2	1	7	1
12 West,	28 South	.	4	8	2
13 West,	26 South	8	..	..	..
13 West,	27 South	7	..	..	..

These tables speak for themselves and need no interpretation. The grant made by Congress was intended to be of some *immediate* benefit to the grantee. The benefit must be derived within five years from the date of the grant, March 3, 1869. But if the claim now set up by the Government is to be allowed Congress failed to accomplish its purpose—the only purpose it could have—the only purpose that could justify the passage of the Act, and this legislation was a foolish and vain thing. True, Congress does not say to the State "you shall not sell," but if this suit is properly brought it might as well have said so.

If it be true that when the right of alienation is forbidden by the letter of the statute—the deed or devise—the attempted condition is void, can it be doubted that the same result follows where the terms of the proviso, while not forbidding aliena-

tion *in terms,* makes alienation impossible *in fact?* To illustrate:

Suppose this second proviso, instead of being worded as it is, should have been framed thus: "Providing further, that the grant of lands hereby made shall be upon the condition that the lands shall be sold to persons over the age 100 years only, and in quantities not greater than one acre to each person and at a price not exceeding $2.50 per acre." Could anyone doubt the invalidity of the attempted restraint?

The rule announced by the courts became a part of settled judicial procedure, not because of the *language* of the grant, but because of the *effect* of the language. The right of alienation was considered an inseparable element in a fee simple title. It could not be taken away and the title remain. And so, whether the grantor forbade the exercise of it in terms or created a situation which made its exercise impossible in fact, the grant was sustained and the attempted debasement of the title was declared void.

The testimony before the Court, and this transcript of the Land Office Records, show that up to 1875, covering the whole period allowed for the construction of the road in five entire townships, 28-9, 28 and 29-10, 27 and 28-11, not a single entry was made. In 29-9 two entries only were made; in 29-8 four entries, and in 27-12 five entries, and during all this time the Government was *giving away* its

land and no one would take it, although they might have had it for the asking.

As to the claim made by the Government that the lands involved in this suit are agricultural lands or are adapted to settlement and cultivation because, after the timber is removed they will become such, it is sufficient to say that the testimony does not sustain it and if it did the fact would be immaterial. On this point we call the Court's attention to the case of the United States against Budd, 43 Federal 630, afterwards affirmed by the Supreme Court of the United States, 144 U. S. 154, 166, where this contention is disposed of. Mr. Justice Brewer, writing the opinion of the Supreme Court, says, among other things: "If it be suggested that this dense forest might be cleared off and then the land become suitable for cultivation, the reply is, that the statute does not contemplate what may be, but what is. Lands are not excluded by the scope of the Act, because, in the future, by large expenditures of money and labor they may be rendered suitable for cultivation. It is enough that at the time of the purchase they are not in their then condition fit therefor. The statute does not refer to the probabilities of the future, but to the facts of the present."

BONA FIDE PURCHASER

The defendant is an innocent purchaser in good faith, for full value and without notice. As such its title is perfect.

It is unnecessary to multiply authorities on this

point. There is no conflict in the decisions. A *bona fide* purchaser takes practically a new title and the law guarantees it. His title is not only safe in his own hands, but he may transfer it to one who had actual knowledge of a given defect and the transferee will take a good title.

In the United States against Detroit Timber Company, 131 Federal, pages 677 and 678, Judge Sanborn, speaking for the Court, said:

"Finally, this is a suit in equity. The equitable claims of the United States appeal to the conscience of a chancellor with the same, but with no greater or less, force than would those of an individual in like circumstances. *Bona fide* purchasers are the especial favorites of courts of equity. In Boone vs. Chiles, 10 Pet. 177, 209, 9. L. Ed. 388, Mr. Justice Baldwin, in delivering the opinion of the Supreme Court, said:

"'A court of equity can act only on the conscience of a party. If he has done nothing that taints it, no demand can attach upon it so as to give any jurisdiction. (Sugd. Vend. 722.) Strong as a plaintiff's equity may be, it can in no case be stronger than that of a purchaser who has put himself in peril by purchasing a title and paying a valuable consideration without notice of any defect in it or adverse claim to it; and when, in addition, he shows a legal title from one seized and possessed of the property purchased, he has a right to demand protection and relief (9 Ves. 30-34), which a court of equity imparts liberally'."

This was affirmed by the Supreme Court in 200 U. S., page 321.

United States against Willamette Valley Railroad Company, 42 Federal, 360.

United States against California & Oregon Land Co., 148 U. S. 40 and 41.

In United States vs. Willamette Valley & Cascade Mountain Wagon Road Co., 55 Federal 711, the Court had under consideration the wagon road grant of July 5, 1866. On March 2, 1889, Congress passed an Act "To determine the question of the seasonable and proper completion of the said road in accordance with the terms of the granting act either in whole or in part, and the legal effect of the several certificates of the Governor of Oregon of the completion of the road, and to declare forfeited to the United States all land not earned in accordance with said Act, saving and reserving the right of all *bona fide* purchasers of such lands for valuable consideration." And providing further that said suit or suits should "be tried and adjudicated in like manner and by the same principles and rules of jurisprudence as other suits in equity are therein tried."

In pursuance of that Act the suit was brought to forfeit the grant. The defense of innocent purchaser was set up by the defendant, and considering this contention of the defendant's attorneys, the Court (Judge Gilbert) said:

"The contention of counsel for the United States that the defendants could not have occupied the

position of innocent purchasers so long as patents for the land had not issued, is not supported by the authorities. The grant was a grant in *praesenti.* The language of the granting clause was 'that there be and hereby is granted to the State of Oregon.' This made it a present grant of an estate in fee upon condition subsequent, notwithstanding the fact that the lands were required to be subsequently selected. U. S. vs. Willamette Val. & C. M. Wagon Road Co., 42 Fed. Rep. 357; Schulenberg vs. Harriman, 21 Wall. 44; Missouri, K. & T. Ry. Co. vs. Kansas Pac. Ry. Co., 97 U. S. 491; Van Wyck vs. Knevals, 106 U. S. 360 (1 Sup. Ct. Rep. 336). Patent was not necessary to convey the title, and when it issued it was only evidence of a title that had already passed. Rutherford vs. Green's Heirs, 2 Wheat. 196; Wright vs. Roseberry, 121 U. S. 488 (7 Sup. Ct. Rep., 985). The defendants are clearly shown to be *bona fide* purchasers. As such, their rights would be conserved in a court of equity under the general principles of jurisprudence governing the Court irrespective of the statute, but in this case Congress has seen fit to expressly declare, in the Act authorizing the prosecution of this suit, that the interests of all such purchasers, if any there be, shall be protected."

After a discussion of the effect of the failure of the Government to claim forfeiture within reasonable time, Judge Gilbert said:

"These facts render it inequitable that the United

States should at this late date and after such long non-action and acquiescence, assert title to the lands, or claim a forfeiture of the same for a failure to construct the road within the five years succeeding the land grant of July 5, 1866."

That under these authorities the Southern Oregon Company was an innocent purchaser for full value is conclusively established by the testimony.

WE REFER THE COURT

First. To the deposition of W. W. Crapo.

Mr. Crapo was a lawyer, a capitalist and a man of wide experience. He had been connected with land grant railroads before this and explains fully his relation to them. He testifies that neither himself nor any officer of the Southern Oregon or Oregon Southern Improvement Company, as far as he knew, ever had any knowledge of any defects in the title to the Coos Bay Wagon Road land. (See pages 19 to 29, Brief of Facts.)

Second. To the testimony of William Rotch.

Mr. Rotch is another witness for the defendant and testifies to the same thing. Mr. Rotch was treasurer and assistant secretary of the Oregon Southern Improvement Company from April, 1883, to August, 1884. His testimony is complete and full to the effect that neither himself nor anyone had any knowledge of any alleged defect in the Coos Bay Wagon Road title. He explains the situation of the company and the fact that the Oregon Southern

Improvement Company was insolvent, the occasion of the foreclosure proceedings and the fact of the full value having been paid for the land. (See pages 29 to 45, Brief of Facts.)

Third. J. A. Yoakam.

Mr. J. A. Yoakam was in the employ of the Oregon Southern Improvement Company from 1883—had charge of their logging and land interests, etc.—and was manager afterwards. His testimony is found from page 279 to 283, printed Abstract. He goes fully into the question and testifies that at no time while he was in the employ of the company was it suggested by anybody that there was a defect in the title to the land because of any limitation in the grant. (See pages 282 to 283.)

Fourth. Mr. Robert E. Shine.

Mr. Robert E. Shine was a witness, his testimony being taken in San Francisco by deposition. Mr. Shine was bookkeeper and secretary and local manager for about ten years, following Mr. Yoakam. He testifies that this question of title never was raised by anybody and that until the time of Nicholls' suit he never heard of the pretended limitation contained in the grant as to the power of limitation. (See page 45, Brief of Facts.)

We call the attention of the Court to the elaborate abstract of title furnished by Hazard & Wilson, Defendant's Abstract No. 207 and opinion ac-

companying the same. (Defendant's Exhibit No. 219, pages 371 to 379, printed Abstract.)

This testimony taken into consideration with all the circumstances surrounding the transfer of title from Besse to the Oregon Southern Improvement Company, the foreclosure proceedings and subsequent transfer of title to the Southern Oregon Company, proves, as satisfactorily as any testimony ever can prove, that Besse, the Oregon Southern Improvement Company and the Southern Oregon Company were *bona fide* purchasers for full value.

WE PLEAD FURTHER IN DEFENSE TO THE GOVERNMENT'S SUIT THAT THE GOVERNMENT IS ESTOPPED TO ASSERT A CLAIM FOR FORFEITURE

It has been so often declared by the courts that it may well be considered substantive law that when the United States goes into court it goes in as any other suitor and is as much bound as any other suitor by the rules of equity, and may be estopped in the same manner. In no case is this doctrine more emphatically declared than in the case of the United States vs. the Willamette Valley & Cascade Wagon Road Company, 54 Federal 807, 811, 812. Judge Gilbert, writing the opinion in that case, says:

"No good reason can be offered why the United States, in dealing with their subjects, should be unaffected by considerations of morality and right which ordinarily bind the conscience. The defense of estoppel stands upon different ground from that

wrongs which it would promptly condemn if practiced by one of them upon another."

See United States vs. M. K. & T. Ry. Co., 37 Federal 68, 70.

See United States vs. McLaughlin, 30 Federal 147, 161.

See Jones vs. United States, 96 U. S. 24, 29.

In United States vs. Dalles Military Road Co., 41 Fed. 493, and United States vs. Oregon Central Military Road Co., 41 Fed. page 501, the then Circuit Court for the District of Oregon had under consideration the grant to The Dalles Military Road Company on a bill filed by the Attorney General, praying for a forfeiture of lands granted by the Act of Congress, February 25, 1867. Judge Sawyer dismissed the bill and said, among other things, on page 500:

"It seems to me that the cause of suit ought to be regarded as stale, so as to render it inequitable, under the circumstances of the case, to prosecute it now within the established principles of equity jurisprudence. * * * Whatever is inequitable, as between man and man, in their dealings with each other, should, also, be deemed inequitable, as between the United States and those with whom they condescend to deal, under like circumstances; and, I take it, that the same decree is proper in this case, that would have been proper, had a private party been the grantor, and had he by both his positive, affirmative action, and his non-action, for

so long a time, given purchasers from his grantee so good reason to believe, that he was fully satisfied with the performance of the conditions of the grant."

We introduce in evidence the record of four suits brought by the Government on this very grant, to wit:

United States, Complainant, vs. The Coos Bay Wagon Road Co. and the Southern Oregon Co., Defendants. Bill filed February 18, 1896. (Defendants' Exhibit 240.)

United States, Complainant, vs. The Coos Bay Wagon Road Co., Southern Oregon Co., *et al.,* Defendants. Bill filed February 29, 1896. (Defendants' Exhibit 241.)

United States, Complainant, vs. The Coos Bay Wagon Road Co., Southern Oregon Co., *et al.,* Defendants. Bill filed February 29, 1896. (Defendants' Exhibit 242.)

United States, Complainant, vs. The Coos Bay Wagon Road Co., alone, Defendant. Bill filed August 25, 1897. (Defendant's Exhibit 243.)

In this last suit the bill is a bill of discovery and the prayer is:

"Your orator prays for the construction of the grant and a decree defining the rights of the parties in view of the grant and the proceedings thereunder."

The Wagon Road Company answered (printed Abstract, page 520):

"That said lands were sold with other lands de-

rived by it from said grant, amounting altogether to 87,405.18 acres, at the price of $1.00 per acre. *Said lands were sold for cash to John Miller, May 31, 1875, for the consideration of $1.00 per acre, amounting in the aggregate to $1,139.59.*"

Taking these cases as they were filed, we find that in Exhibit 240, the Government filed its Bill of Complaint February 18, 1896, against the Coos Bay Wagon Road Company and the Southern Oregon Company, to cancel the Government's patent to the northeast quarter of the northeast quarter of Section 9, Township 28 South, Range 7 West, W. M. In its bill the Government pleads the Act of March 3, 1869, the Act of the Legislative Assembly of the State of Oregon of October 22, 1870, the Act of June 18, 1874, the certificate of the Governor of the State of Oregon, 19th of September, 1872, certifying that the Coos Bay Wagon Road Company had constructed the road, and the patent of the 12th day of February, 1875 (Patent No. 1 of the Government's Bill in this case)—all exactly the same as are pleaded in the bill here. It was alleged then that this quarter section was entered as a homestead on the 22d of January, 1863, and prior to the Coos Bay Wagon Road Grant, and that therefore the patent as to this quarter section should be canceled. On page 414 of the printed Abstract of Record, the Government's Bill of Complaint says: "And your orator further shows unto your honors that it is informed and believes and so charges the fact to

be that the Southern Oregon Company, defendant herein, claims to be the owner in fee simple of said northeast quarter of the northeast quarter of Section 9, Township 28 South, Range 7 West, W. M., its claim of title being as follows, viz., a deed to it through a chain of *mesne* conveyances from the patentee; that said Southern Oregon Company claims possession of said lands, and the same together with the improvements thereon are of the value of $1600."

A demurrer was interposed by the defendant, and was sustained and a decree entered dismissing the bill (page 418, printed Abstract of Record).

In this suit the Government was advised of the position of the Southern Oregon Company and its claims and had abundant opportunity, if it desired to do so, to bring its suit for cancellation of the whole grant as it has done here, instead of for only one quarter section.

Exhibit 241 is found on pages 419-438 of the printed Abstract of Record. This was a suit brought February 29, 1896, by the United States vs. Coos Bay Wagon Road Company, Southern Oregon Company, T. R. Sheridan, J. P. Sheridan, R. S. Sheridan, Margaret Briggs, Helen M. Rook and Mary A. Rook. The Bill of Complaint is quite lengthy and pleads every fact pleaded in the Bill of Complaint in the present case. It then pleads (page 426, printed Abstract) the O. & C. granting Act of July 25, 1866, and alleges that the O. & C. Co. definitely fixed the line of its road across the grant to the State of Oregon for the Coos Bay Wagon Road, of date

March 3, 1869. It alleges that an error was committed in issuing patents to the Coos Bay Wagon Road Company for the lands described in the bill, because of the prior definite location of the O. & C. road over these lands. The different defendants, Sheridans, Briggs, Rook, etc., are made defendants because they claimed to be the owners in fee simple by deed from the Coos Bay Wagon Road Company, the patentee.

It is alleged (page 432 of the printed Abstract of Record) that the Southern Oregon Company claims to be the owner of all the lands except those claimed by the Sheridans, etc., and that the same are valued at $600,000.00. The prayer of the bill is that the patent conveying *all* these lands "may be set aside, canceled and declared null and void, and that the several *mesne* conveyances from the said Coos Bay Wagon Road Company to the defendants herein may be set aside, canceled and declared null and void, and your orator prays all other and proper relief in the premises."

A demurrer was filed by the Coos Bay Wagon Road Company and the Southern Oregon Company, which demurrer was sustained (page 436, Abstract) and the complaint dismissed (page 437, Abstract).

The Government knew when it filed this bill, February 29, 1896, everything it knows now about these lands. It admits knowledge in its bill of the claim of the Coos Bay Wagon Road Company and the Southern Oregon Company, and of the prior *mesne* conveyances leading up to the transfer to the

Southern Oregon Company, and might have brought the present suit then as well as it could later on. Some effort is made to defeat defendants' claim to an estoppel on account of this complaint, by introducing in evidence a letter from Dan R. Murphy, United States District Attorney, to the Attorney General, of May 21, 1897, but this proves nothing and is immaterial. It isn't of importance to determine *why* Judge Bellinger dismissed the bill, but it *is* important to know that the bill was filed and that it was dismissed and that the Government could in that bill or in lieu of that bill, by a different bill, if you please, have litigated every thing that is presented for litigation in the bill in this case.

Exhibit 242 is the Judgment Roll in the case of the United States vs. Coos Bay Wagon Road Company, Southern Oregon Company, Lorens, John and Mathias Vogl, W. S. Hamilton, Mary Mark, Charlotts and Frederick Elliott, John Weaver, John Norman and C. C. Bonebrake. In the complaint in that suit, filed February 29, 1896, all the facts were alleged as in the other cases and in this suit, as to the Acts of Congress, the Legislature of the State of Oregon, the completion of the road and issuance of patents. It was alleged that Samuel C. Braden prior to March 3, 1869, entered the northwest quarter of the southwest quarter of Section 25, Township 27 South, Range 12 West as a homestead. It was further alleged that certain lands described in the bill amounting

to 1099.59 acres lay entirely without the limits of the grant of March 3, 1869, and that the patent conveying said lands to the Coos Bay Wagon Road Company was issued erroneously. It is alleged that Lorenz, John and Mathias Vogl claimed the west half of the northwest quarter of Section 33, Township 25 South, Range 12 West, through *mesne* conveyances from said Southern Oregon Company, and that it was worth $2400.00. The same allegations are made in regard to W. S. Hamilton concerning Lot 4 of Section 5, Township 26 South, Range 12 West, and that these premises were worth $3000.00. Mary Mark comes in the same category with the northwest quarter of the northwest quarter of Section 27, Township 26 South, Range 12 West, and it is alleged these premises are worth $1250. It is alleged that Charlotte and Frederick Elliott claim in the same way the northwest quarter of Section 13 and the northwest quarter of the southwest quarter and Lot 1 of Section 13, Township 26 South, Range 13 West, and it is alleged these premises are worth $8000.00. It is alleged that John Weaver claims in the same manner the southwest quarter of the northeast quarter of Section 13, Township 26 South, Range 13 West, and that said premises are worth $1000.00. It is alleged that John Norman claims in the same manner the northwest quarter of the northeast quarter of Section 13, Township 26 South, Range 13 West, and that said premises are worth $2750.00. It is alleged that C. C. Bonebrake claims the southeast quarter of Section 1,

Township 26 South, Range 13 West, and that said premises are worth $2000.00. It is alleged that the Southern Oregon Company claims all the rest of the land described in said bill, and that said land is worth $22,000.00, and that said Southern Oregon Company claims by chain of *mesne* conveyances from the Coos Bay Wagon Road Company.

The prayer of the bill is "that the patent purporting to convey the title to the said above-described lands may be set aside, canceled and declared null and void, and that the several *mesne* conveyances from said Coos Bay Wagon Road Company to the said defendants herein may be set aside, canceled and declared null and void." (Page 453, printed Abstract.)

To this bill an answer was filed by the Coos Bay Wagon Road Company (pages 456-471, printed Abstract) and by the Southern Oregon Company (pages 472-494, printed Abstract), and a replication by the Government (pages 494-495, printed Abstract). To this replication a demurrer was filed (pages 495-496, printed Abstract), and the demurrer was sustained and the Government's bill dismissed (page 497, printed Abstract).

It is unnecessary to comment upon the filing of this demurrer or the disposal of it. Of course, there is no such practice, but it is of no importance to consider here the reasons which brought about the dismissal of the bill. The matters we are calling attention to are contained in the bill and the answers filed by the Coos Bay Wagon Road Company

and Southern Oregon Company, and the knowledge that the Government necessarily had of the chain of title of the Southern Oregon Company. It admits in its bill its knowledge of the disposition of these lands by the Coos Bay Wagon Road Company and is further advised by the answers of the Coos Bay Wagon Road Company and the Southern Oregon Company of the reasons which warranted, at least in the judgment of the defendants, such disposition.

From pages 485 to 491 of the printed Record is the complete chain of title. Every deed mentioned in the complaint in the present suit is set out there and the Government was advised of the deeds to Miller, Besse, the Southern Oregon Company, etc. If the Coos Bay Wagon Road Company violated the terms of the grant in its deed to Miller or to Besse, the Government was advised of it then, if it did not know it before, and might have asked the forfeiture then as well as it does now and with as much reason.

Exhibit 243 (page 500 to 528 of the printed Abstract) is the Judgment Roll in the case of the United States vs. Coos Bay Wagon Road Company. The bill in that case was filed August 25, 1897. It is for the same relief and upon the same alleged facts as appear in Exhibit 242. Discovery is sought by the complainant and interrogatories are appended at the foot of the bill and the defendant is requested to answer the following questions:

First. Whether any of the lands described herein have been sold?

Second. What are the particulars of such sale, if sales were had?

Third. How were the lands sold, for cash or on deferred payments; to whom were the lands sold; when were they sold, and for what consideration?

Fourth. Were the lands, if sold, sold with or without covenants of warranty?

Fifth. If any of the lands were sold on deferred payments, state the particulars of contracts of such sales; what has been paid thereon; how much is still due, and when the same is payable?

The Coos Bay Wagon Road Company filed its answer September 8, 1898, and answered these questions categorically. To the third interrogatory the defendant said "said lands were sold for cash to John Miller, May 31, 1875, and for the consideration of $1.00 per acre, in the aggregate $1139.59. (Printed Abstract, p. 520.) Decree was entered August 7, 1901, canceling the patent to Braden for the northwest quarter of the southwest quarter of Section 25, Township 27 South, Range 12 West, and granting complainant the United States, judgment against defendant Coos Bay Wagon Road Company for $1099.59, "being the value of 1099.59 acres of land described in Plaintiff's Bill of Complaint." (Printed Abstract, p. 528.)

This 1099.59 acres of land was included in the deed to John F. Miller and passed on down to the Southern Oregon Company by the chain set out in pages 488, 489, 490 and 491 in the printed Abstract of Record. It was sold to Miller at $1.00 an acre

and the Government takes judgment in this suit (Exhibit 243) for $1.00 an acre, thus ratifying as far as anything can be ratified, the action of the Coos Bay Wagon Road Company in selling the land for that price. This 1099.59 acres is described in the bill, Exhibit 243, as follows (page 505, printed Abstract):

Township 25 South, Range 12 West

	Section
S.E. ¼ of S.E. ¼	19
N. ½ of N.E. ¼, N. ½ of N.W. ¼, S.E. ¼ of N.W. ¼, and S.W. ¼ of N.E. ¼	29
W. ½ of N.W. ¼	33

Township 26 South, Range 12 West

N. ½ of N.W. ¼, N.W. ¼ of S.W. ¼	5
N.W. ¼ of N.E. ¼, N. ½ of N.W. ¼, S.W. ¼ of N.W. ¼, N.W. ¼ of S.W. ¼	7

Township 26 South, Range 13 West

N.W. ¼, W. ½ of N.E. ¼, N.W. ¼ of S.W. ¼, and Lot 1	13
W. ½ of S.E. ¼, S.E. ¼ of the S.E. ¼	1

If we turn now to page 133, printed Abstract, we find that the bill in the present case seeks a forfeiture of some of this same land, to wit:

Township 25 South, Range 12 West

	Section
S.E. ¼ of S.E. ¼	19
N. ½ of N.E. ¼, N. ½ of N.W. ¼, S.E. ¼ of N.W. ¼, S.W. ¼ of N.E. ¼	29

Township 26 South, Range 12 West

	Section
N.W. ¼ of the N.E. ¼, N.E. ¼ of N.W. ¼, and Lots 1, 2, 3 and 4	7

Township 26 South, Range 13 West

W. ½ of S.E. ¼	1

It was further insisted in the court below that in these suits the Government sought to cancel the patents to lands "entirely without limits of the grant" and that therefore "there is nothing inconsistent between the earlier cause of action and the instant case." But this is not correct. In the first suit brought (Exhibit 240, Bill filed February, 1896), the Government asks for a cancellation of the patent to the Northeast Quarter of the Northeast Quarter of Section 9, Township 28 South, Range 7 West. A glance at the map (Exhibit 218), shows that this whole section lays right in the center of the grant in the Looking Glass Valley.

There were two suits brought February 29, 1896 (Exhibits 241 and 242). In Exhibit 241, it was claimed that all the lands described in the Bill, being 30,044.46 acres, was within the boundaries of the grant to the Coos Bay Wagon Road Company, but that the O. & C. Company took it because that Company on March 26, 1870, filed its map of definite location under the grant of July 25, 1866. A demurrer was filed by the Coos Bay Wagon Road Company and the Southern Oregon Company to this Bill, which demurrer was sustained January 12, 1897, and the Bill dismissed June 12, 1897. All these lands

lay in Townships 28 and 29 South, and Ranges 6, 7, 8 and 9 West.

Referring again to the map (Exhibit 218), we find that the description of the different parcels of land set out in the Bill in this suit were included in a strip of land four miles wide lying directly across the Coos Bay grant from north to south. It was alleged in the Bill in that suit (Exhibit 241), that all these lands being in the place limits of the O. & C. grant of 1866, and having been subsequently patented to the Coos Bay Wagon Road Company, should go to the O. & C. Company by right and the Coos Bay Company's patent should be cancelled.

Referring now to the Bill in the present suit and Exhibit "E" thereof (pages 131 to 138, printed Abstract of Record), we find that all the lands included in the Bill in Exhibit 241 are included in the Bill in this suit and cancellation of the patents is demanded here for breach of condition.

In Exhibit 242 (Bill filed February 29, 1896, the same day as in Exhibit 241), a cancellation of patents is asked for covering lands in Townships 25 South, Range 12 West; 27 South, 12 West; 26 South, 12 West, and 26 South, 13 West. There is but one small piece in 27 South, 12 West—the Northwest Quarter of the Southwest Quarter of Section 25. This is the Braden piece hereinafter referred to. It is alleged that the lands in 25 South and 26 South, 12 West, and 26 South, 13 West, lie outside the limits of the grant. But a reference to the map (Exhibit 218), shows that this is entirely erroneous, as 26

South, 12 West, and 26 South, 13 West, are both within the limits of the grant. This is the Coos Bay section, the most valuable part of the grant. The sections involved in Exhibit 242 are 5 and 7 in 26 South, 12 West, and 1 and 13 in 26 South, 13 West, and cancellation of the patents to these lands is sought because they lie *outside the grant.* Exhibit "H" of the present Bill asks for a cancellation of the patents to the same lands because they lie *inside the grant.*

Argument could add nothing to the record as made in these cases. The defendant in this case was defendant in three of them. The complete defense as now set up was pleaded in these suits. The Government was advised of this defendant's position and claims. The record advised the Government of the sale to Miller, May 31, 1875, and in Exhibit No. 242 the complete chain of defendant's title was pleaded. The Government could have asked for forfeiture at the time it brought each of these cases with as much right as it can do it now, but it did not; and inasmuch as it did not do it then it cannot do it now. The Government cannot be forever litigating this grant.

Whether the different provisos in the Act of March 31, 1869, created "conditions," or were covenants only, they were conditions or covenants that the Government had a right to waive if it saw fit. And it did waive them. For forty years this road has been completed and the grant earned. During

all that time the different holders of title, in the order of their holdings, have openly and notoriously claimed the fee simple title to this property. The Coos Bay Wagon Road Company, as appears from the record, as early as April, 1880, brought suit against Charles Crocker (6 Sawyer, page 574). In that suit the sale of 96,000 acres of land to Miller was pleaded and the contract was enforced in this Court.

The different suits referred to above, brought by the Government, show that during the entire period down to the bringing of this suit, the Government must have known and approved the dealings of the Coos Bay Wagon Road Company with this grant.

Our position is this: If in the various suits above referred to, and the records of which have been introduced in evidence, the Government *might* have litigated the question of forfeiture, it was compelled to do it. And inasmuch as it did not do it, it is now estopped to open up the controversy again. In the case of the United States vs. California & Oregon Land Company, 192 U. S. 355 (24 Supreme Court Reporter, page 266), the Supreme Court in effect decided this case. In that case the bill was filed by the Government to cancel certain patents issued to the Oregon Central Military Road Company, under the Act of July 2, 1864. The defendant, California & Oregon Land Company, claimed title through *mesne* conveyances from the patentee. The grounds for asking the cancellation of the patents were that the lands in controversy were within the

Klamath Indian Reservation, and therefore did not come under the grant—that they were "lands heretofore reserved to the United States," and that they belonged to the Indians, and for that reason patents to the railroad company should be canceled in order that the Indians might afterward get the lands. Prior to this time, however, the Government had brought a suit to cancel the whole grant to the Oregon Central Military Road Company for breach of condition. That is to say, it was alleged that the wagon roads were not completed within the time required by the grant by the United States and the bill prayed forfeiture, as for breach of condition. The Government was defeated in its former suit and the bill dismissed. Referring to this dismissal, Mr. Justice Harlan, writing the opinion in the second suit, said: "But if the United States was at liberty to state all its grounds for claiming the land, it was bound to do so on the same principle and rules of jurisprudence as other suits in equity are therein tried." The Supreme Court dismissed the Government's bill for the reason, therefore, that the Government was estopped because in its first bill, asking for a forfeiture, generally, of all the lands embraced in the grant, because of non-completion of the road, it might have also included a prayer for the cancellation of the patents involved in the second suit for the reasons set out in the bill in the second suit.

If, therefore, the Government is barred from litigating title to a *portion* of the grant because it

had once before brought a suit to cancel the *whole* grant upon another ground, we submit that it is estopped here to bring a suit to cancel the *whole* grant for a cause existing at the time the former suits were brought to cancel a *part* of the grant, and which might have been made a part of the bills in either of these cases.

RIGHT OF GOVERNMENT TO BRING SUIT

That these cases constitute a record which should estop the Government from now litigating the question of forfeiture seems apparent. Counsel for the Government in his brief filed in the lower court, sought to break the force of this presentation by claiming that at the time the four suits above enumerated were begun and tried, the Government could not have asserted breach of condition and demanded forfeiture. This extraordinary claim was stated as follows: "Whether the defendant or any of its predecessors in title, subsequent to the State, had forfeited the grant, was not presented in any of the cases named in the answer, for the simple reason that the Executive Department of the Government *was not empowered at that time to present it. The authority to do so did not come into existence until the passage of the Act of April 30, 1908.* This suit is in pursuance of that authority—that law. *When those suits were commenced, the law forbid the inclusion of the present cause of action.* It would be an anomaly to say that a matter which

the law did not allow the court to consider had been lawfully decided by it."

It would be sufficient answer to this claim of counsel to say that if it were necessary, in order to authorize the beginning of a suit in equity, such as this is, to have a legislative declaration authorizing it, such legislative declaration could have been obtained as completely before these suits were brought as it was afterward obtained, April 30, 1908, so that the claim that the suits could not have been brought at that time for a forfeiture is without foundation.

But we do not concede the law as stated by counsel. On the oral argument, the same doctrine was advanced and it was asserted that the District Court so held in the United States against the Oregon & California Railroad *et al.,* 186 Federal 925. No such holding was made in that case nor in any case, so far as we are advised. It will be remembered that in the Oregon & California case the contention of the railroad company was, that the bill lacked equity for the reason that the proceeding to enforce a forfeiture was essentialy an action at law, and that there should be "office found" to sustain jurisdiction. The whole controversy as to the jurisdiction of the court was based on this one contention. In the opinion, 86 Fed., page 926, the Court says: *"The essential and particular contention of counsel for defendant is that they are entitled to a common-law proceeding, and that this contemplates a trial by jury and not a proceeding in equity."* Answering this claim of the railroad

company, the Court held that the bill in that case, on the equity side of the Court, following the resolution of Congress directing such proceeding, was proper and the Court had jurisdiction. There was no decision, and no call for any decision, that the Government could not have proceeded if it were not for the Act of April 30, 1908.

The cases relied upon by counsel are:

United States vs. Repentigny, 5th Wallace 211.

Schulenberg vs. Harriman, 21 Wall. 44.

United States vs. New York Indians, 170 U. S., page 1.

United States vs. Northern Pacific, 177 U. S., page 435.

As we presume this same claim will be made here, we will discuss it in advance, to avoid the necessity for a reply brief.

Answering these authorities in the order of their presentation, we say:

First. That the doctrine announced by counsel was not declared in the Repentigny case at all. In that case the grant was made by the Governor of Canada to Louis de Boone and Count Repentigny. De Boone never took possession of the grant and Repentigny was only in possession for a time, and when war broke out in England he left to engage in military service for his government and never returned. Congress in an Act passed April 19,

1860, directed the filing of the bill. It is unnecessary to go into a detailed examination of the facts brought out by the testimony. It is sufficient to say that the question of whether the suit was properly brought was raised. The question apparently being whether the conditions in the grant were broken and, if so, whether the title to the land reverted automatically because of the breach. The Court held, in line with all authorities, that such result could not follow, and in reference to the proper procedure said, page 267, 5th Wallace: "And we agree that before a forfeiture or reunion with the public domain could take place, *a judicial inquiry should be instituted,* or, in the technical language of the common law, office found or its legal equivalent. A legislative act, directing the possession and appropriation of the land, is equivalent to office found. The mode of asserting or of resuming the forfeited grant, is subject to the legislative authority of the government. *It may be after judicial investigation,* or by taking possession directly, under the authority of the government, without these preliminary proceedings." This is all the Court held, and it is very far, indeed, from saying that the Court had not jurisdiction without a legislative authority authorizing the suit.

Second. 21st Wall. 44, Schulenberg vs. Harriman, is a familiar case in railroad and land grant litigation. In that case there was a grant, June 3, 1856, to the State of Wisconsin of certain lands to aid in the construction of railroads. There was a

condition in the grant and the condition was broken. Harriman, and those whom he represented, cut certain timber upon lands being a portion of the grant. Schulenberg and others claimed the timber and brought replevin against Harriman. It was claimed in the case that, inasmuch as the condition in the grant was broken, the lands embraced in the grant automatically went back to the Government, without any decree of the court or other proceedings declaring forfeiture. And it was in relation to this claim, and this claim only, that the Court said, on page 62: "If the grant be a public one it must be asserted by *judicial proceedings authorized by law,* the equivalent of an inquest of office at common law, finding the fact of forfeiture and adjudging the restoration of the estate on that ground, or there must be some legislative assertion of ownership of the property for breach of the condition, such as an act directing the possession and appropriation of the property, or that it be offered for sale or settlement." How this can be construed into a declaration that it needed a legislative authority to begin a suit for forfeiture it is difficult to understand, and yet counsel claims it.

Third. The next case in order is the New York Indians, case 170 U. S., page 1. The very same claim was set up, that where there was a condition in a grant and a breach of the condition, that forfeiture took place automatically and the land reverted, as of course. Answering this claim, the Court held: "Upon a breach of it (the condition)

the Government might decree a forfeiture, but had no power by simple executive action to re-enter, take possession of the lands, and sell them." The Court then quotes from the 5th and 21st Wall. as containing a statement of the law governing the case. This case, therefore, does not sustain counsel's contention either.

Fourth. The next case is the United States vs. Northern Pacific, 177 United States, page 435. In that case the question here presented did not arise at all. And the Court, Justice Shiras writing the opinion, was particular to limit the decision to the point in controversy. As to the final decision, he said: "It is always safe in approaching a question of this kind to have regard to the pleadings in the case. Otherwise there is danger that the court and counsel may be drawn into discussions outside of the case actually presented." The question presented in that case was where the eastern terminus of the road was, that is, whether it was Duluth or Ashland. The Court stated the controversy thus: *"In other words, if we understand the position, it is claimed on Section 8 of the Act, July 2, 1864, non-completion of the railroad within the time limited of itself operates as a forfeiture; the grant immediately reverts to the Government; and courts must so hold on the simple statement of the fact of non-compliance within the limit. We do not understand this to be a correct statement of the law."* The Court then follows with a citation from 5th and 21st Wall., and adopted the doctrine therein announced.

Counsel for the Government in the court below cited 16th Attorney General Opinions, pages 572 to 576, as sustaining the position that legislative authority is necessary. But there is nothing in this opinion that holds that doctrine. The opinion is an answer by the Attorney General to the Secretary of the Interior in regard to the Atlantic & Pacific Railroad grant. The company applied for the appointment of commissioners to examine twenty-five miles of road which was built after the time for completion—July 4, 1878—had expired. It was suggested that, inasmuch as the time for completion of the road had expired, that there was a breach of condition and the grant, so to speak, forfeited itself. It was in answer to this suggestion that the Attorney General wrote his letter, in which he says: "It (the company) having then a present grant, even if it be one liable to forfeiture, it still has a right to proceed to construct the road. *Until in some form* advantage shall be taken of the breach of conditions, it would be the duty of the executive to give it the benefit of the grant." This merely announces a rule that no one has ever questioned—that is, that no one but the grantor can take advantage of a breach of condition and ask for forfeiture and not even then until *"in some form,"* as the opinion states it, the grantor manifests its desire to have the grant forfeited. The grant remains unaffected by the fact that it *may* sometime be forfeited.

In Minneapolis & St. C. R. Co. vs. Duluth & W. R. Co., 47 Northwestern, page 465 (Supreme Court of Minnesota), there was a contest over a forty-acre tract of swamp land claimed by three different sets of claimants, each claiming under the legislative acts of the State of Minnesota. The Court, in disposing of these, said:

"By reference to the Act of March 9, 1875, it will be seen that the grant to the intervenor is what is familiarly known as a grant '*in praesenti* upon conditions subsequent.' It is elementary law that such a grant is not forfeited by mere default of the grantee in the conditions, but only by some affirmative act of the state, after the breach or default, declaring or asserting the forfeiture. *The right of the state to a forfeiture must be asserted by judicial proceedings,* the equivalent of an inquest of office at common law, finding the fact of forfeiture, and adjudging a restoration of the estate on that ground; *or there must be some legislative assertion of ownership of the property* for the breach of the condition; and until this is done the grant remains vested in the grantee, notwithstanding the breach of the condition. Moreover, if, after the breach, the grantee proceeds and earns the grant by the construction of its road, before any action on part of the state asserting or declaring a forfeiture, the state cannot afterwards divest the grantee of the land by declaring a forfeiture. These propositions, as applied to land grants, have become so familiar, especially since the decision in Schulenberg vs. Har-

riman, 21 Wall. 44, that a discussion of them, or a citation of authorities in their support, would be worse than useless."

In United States against Holmes, 105 Fed. 41-43, the Supreme Court said:

"There seems to me no room for reasonable controversy but that the Government of the United States, for the protection of its property is entitled, *without express legislative authority,* to the civil methods ordinarily administered in its courts."

In addition we ask the Court's attention to the case of United States vs. Whitney, 176 Federal, page 593, which is directly in point and decisive. In that case a suit was brought to enforce a forfeiture of title to a reservoir site located on public land on account of an alleged breach by the grantee of a condition subsequent embraced in the original grant. There was no legislative action directing the bringing of a suit by the Attorney General. The Court held that there was a condition subsequent and a breach which brings the case exactly on all fours with the situation claimed by the Government to exist in this case. The Government there was insisting that it had the right to proceed without congressional direction. The defendant controverted this claim. Judge Dietrich, in his opinion, says:

"In the present case there has been no congressional action looking to an enforcement of the forfeiture and the only expression of the legislative will is to be found in the provision already quoted

from the original grant. The precise question submitted for decision therefore is: Was it competent for the Attorney General to institute this proceeding, and is this Court authorized to enforce the forfeiture by finding the breach and decreeing a restoration of the estate? Maintaining that the executive department is powerless to institute such a proceeding until Congress shall have expressly conferred special authority therefor, the defendant attaches great significance to the fact that in referring to judicial declarations of forfeiture the Supreme Court in the cases above cited almost invariably speaks of such actions not merely as judicial proceedings, but as judicial proceedings authorized by law, or instituted under authority of law."

The Court then discusses the different cases cited by counsel and further on in the opinion, pages 598 and 599, it says:

"The defendant has especially urged for consideration Senate Resolution No. 48, approved April 30, 1908 (35 Stat. 571), the resolution under which the present suit was brought, which, together with the circumstances surrounding its adoption, it is contended, implies a legislative assertion and an administrative concession of the claim that the executive is without authority to proceed until Congress shall have first expressly and specially conferred such authority; but the history of this resolution does not warrant such a conclusion. From the proceedings it is clear that there existed in the department of

justice a difference of opinion as to the right to proceed without further legislative authority, and that the question was not entirely free from doubt. Apparently the attitude of the Attorney General was that, while he was personally of the opinion that he already had the right to proceed, there was room for question, and before entering upon expensive litigation, involving vast property interests, it was thought discreet to take the precaution of procuring express authority, and thus effectually and finally setting all doubts at rest. It was in this spirit, as I read the record, that the resolution was asked and granted. Moreover, the acts to which the resolution was directed were of a special nature, and were much less definite in their terms than the one now under consideration. It is possible that a distinction should be drawn between a specific grant by special act to a designated person for a prescribed purpose, and grants affected by compliance with the provisions of general and permanent law. A grant being by special act, it may be argued that authority for its revocation should also be conferred by special act. *But, however that may be,* what substantial reason can be adduced for holding that the resolution referred to conferred greater power upon the Attorney General than is possessed by the executive department under the Act of March 3, 1891, and the constitution and general laws? That resolution does not purport to enlarge the jurisdiction of the courts, or vest in them any additional or peculiar power, nor does it create or provide for

any new or special proceeding. It simply authorizes and directs the Attorney General by appropriate actions in the courts to assert such rights as the United States has in certain vast tracts of land included in the original grants. The Act of March 3, 1891, is general and permanent in its character, and operates continuously to convey the title to public lands to all persons complying with its provisions. It cannot be doubted that the forfeiture clause equally with the granting clause is also in the nature of general law and of a permanent character, and that being true, it is not clear why it should not be held to be ample warrant to the Attorney General to enter the courts and there seek the enforcement of public rights and the restoration of the title to public property, thus 'executing the law.' By the Constitution it is made the duty of the chief executive to 'take care that the laws be faithfully executed'; and, if certain rights are granted by general law, and by the same general law it is provided that such rights shall be forfeited on the breach of certain conditions, the breach existing, it is thought that the executive has the authority to institute proceedings in the courts to have such forefeiture judicially declared, and that suits brought for that purpose are judicial proceedings authorized by law."

A COURT OF EQUITY IS NOT CONTROLLED BY A TECHNICAL RULE OF FORFEITURE FOR BREACH OF CONDITION.

Conceding, as stated in the opening of this brief, equitable jurisdiction, it follows that this being a suit in equity must be governed by the rules of equity procedure. Under the resolution of April 30, 1908, the United States might have proceeded on the law side of the Court. It did not choose to do so. Having appealed to equity it must *do* equity. Whether the proviso in this case created a condition or not, a failure to observe its requirements does not in itself forfeit the grant, or entitle complainant to any relief except as the same may be *equitable.* The breach of the condition or covenant may be waived by the grantor and no one shall be permitted to complain because of the waiver. But when the grantor demands a forfeiture for breach of condition and voices this demand in a court of equity, the court will treat the demand as all demands are treated by the chancellor. The relief sought will be granted only as it is equitable and because it is equitable. Many authorities hold that equity will *never* decree a forfeiture in any case. But waiving that, the court will give only such relief *as is equitable* under the circumstances of the individual case without reference to the question of forfeiture.

Brent against Washington Bank, 10th Peters 596.

United States against Arredondo, 6th Peters 691.

In United States vs. Arredondo there was involved a consideration of a Spanish grant made to Arredondo December 22, 1817, 289,745 acres in Florida. Florida was acquired by treaty February 22, 1819. The condition of the grant was "to establish on the land 200 Spanish families, and to begin the establishment within three years" from the date of the grant.

The United States began suit in 1828 in the Superior Court, District of Florida, under the Act of May 23, 1828, to settle private land claims in Florida.

The Court held this to be a condition subsequent and held further:

First. That settlement was commenced within three years. (Page 745.)

Second. No time was fixed for completion of the establishment.

Third. The condition of settlement of 200 families was not complied with in fact (page 745), and added:

"Though a court of law must decide according to the legal construction of the condition, and call on the party for a strict performance, yet a court of equity acting on more liberal principles will soften the rigor of law, and though the party cannot show a legal compliance with the condition if he can do it *cypres,* they will protect and save him from the forfeiture. (Page 745.)

"The proceeding is in equity according to its established rule; our decree must be in conformity

with the principles of justice, which would in such a case as this not only forbid a decree of forfeiture, but impel us to give a final decree in favor of the title conferred by the grant. (Page 746.)

"We now come to consider the *conditions* upon which the grants were made. According to the rules and the law by which we are directed to decide this case, there can be no doubt that they are subsequent; the grant is in full property in fee, an interest vested on its execution which could only be divested by the breach or non-performance of the conditions which were, that the grantees should establish on the land two hundred Spanish families, together with the requisites pointed out, and which shall be pointed out by the superintendency, and begin the establishment within three years from the date of the grant."

Let us put this case in the same class with the Arredondo case. Let us admit that the proviso limiting the sales created a "condition subsequent" and that there has been breach—or that it is an enforcible covenant. What then? Forfeiture? Not necessarily. *"Our decree must be in conformity with the principles of justice,"* says the Supreme Court. What principles of justice would sustain the taking of this land from the defendant under the circumstances shown by the testimony now before the Court?

We ask the Court's consideration of the testimony of C. G. Hockett, secretary of the Southern

Oregon Company, found on pages 285 and 293, printed Abstract. In answer to a demand made by the Government for a report of receipts and expenses of the Southern Oregon Company connected with this grant, Mr. Hockett prepared from the books a complete statement. We quote as follows from pages 292 and 293, printed Abstract:

"Q. Now, have you made an addition and summary of the difference between the receipts of the company during the existence of the Southern Oregon Company and going back to 1884, or whatever company it may be, and the expenditures?

A. The actual expenditures or the evidence of indebtedness?

Q. Whatever you have there.

A. $691,696.52 that we have paid out more than we have received.

Q. Just give the whole amount you have received first and the whole amount you have paid out. The whole amount you have received from all sources.

A. We received $124,281.92 in the items given here.

Q. And you have paid out, not including this interest, how much?

A. Paid out not including the interest?

Q. Have you paid out not including the interest?

A. $597,148.95.

Q. And the difference then between what you have received and what you paid out is how much?

A. $472,867.03.

Q. That is the excess of the expenditures over receipts, is it?

A. Yes, sir, of actual expenditures and receipts. In addition to that there is $218,829.49 of interest, $218,829.49. to be added.

Q. Does that include, Mr. Hockett, the original cost of the land?

A. No, sir, it doesn't. I didn't include that for the reason that up to that time I hadn't received anything."

It appears from other testimony in the case that the properties cost the Southern Oregon Company about $120,000.00 originally on the 23d of June, 1887. We submit, therefore, that, even conceding the correctness of the Government's claim that this is a case of "condition subsequent" and breach, that a court of equity, even if it decreed a forfeiture, would impress upon the property as a prior lien this $120,000.00 with interest from June 23, 1827, and the further sum of $691,696.52 shown by the testimony of Hockett to be the amount which the grant has cost the company over and above the receipts. If this would be the decree in case of condition and breach, it necessarily follows that the same principle would govern in case of covenant and its enforcement.

THE GRANT TO THE STATE OF OREGON WAS A GRANT *IN PRAESENTI* — NO LIMITATIONS COULD BE PLACED UPON THE PERFECTED TITLE—COMPLIANCE WITH THE PROVISO A MATTER OF GOOD FAITH ONLY BETWEEN THE GOVERNMENT AND THE STATE

The grant to the State of Oregon constituted a contract between the United States and the State of Oregon. Upon performance by the State (by its assignee, Coos Bay Wagon Road Company) of its part of the contract by construction of the road, the title vested absolutely in the State of Oregon. The right to deal with its lands and regulate its local affairs according to a policy to be determined by itself is an attribute of the State's sovereignty and the general government has no constitutional right, after title of land passes to the State, to regulate or control the manner in which the State shall manage its affairs or deal with its own property.

In Camp vs. Smith, 2 Minnesota, 131-144, there was presented to the Court the question of whether or not a pre-emptor under the Act of Congress of September 4, 1841, might, after purchase or entry and before his patent issues, grant the land or his interests therein. Section 12 of the Act of Congress of September 4, 1841, reads as follows:

"And be it further enacted: that, prior to any entry being made under and by virtue of the provisions of this Act, proof of the settlement and improvement thereby required, shall be made, to the satisfaction of the register and receiver of the land district in which such lands may be, agreeably to such rules as shall be prescribed by the Secretary of the Treasury, who shall each be entitled to receive fifty cents from each applicant for his services to be rendered as aforesaid; *and all assignments and transfers of the right hereby secured, prior to the issuing of the patent, shall be null and void.*"

The facts were that on April 28, 1855, one Anson Northrup purchased and entered, as a pre-emptor, certain Government land and that a patent was issued to him on the 17th day of July, 1855. That on the day of the purchase, but after the entry was perfected, the said Northrup and his wife executed a general warranty deed for the land to Atwater, and after patent had issued Northrup and wife executed and delivered another deed to Atwater under date of October 26, 1855, quit-claiming all rights, etc., to the property. As section 12 *supra* forbade the transfer it was claimed that Atwater got no title. The suit was apparently one to quiet title and the complaint was demurred to. Demurrer was overruled and judgment entered for plaintiff, who was claiming under Atwater. The Court in stating the point at issue said: "The grounds of demurrer, as urged in the argument, are, in substance, that Northrup had no

title to the land entered, before the patent issued; that the first deed to Atwater was, therefore, void; that Atwater, having no interest, no estate passed from him to his assignees; and that no estate passed to, or vested in, the grantees of Atwater, by virtue of the deed made by Northrup and wife after the issuing of the patent, because the deed was made in confirmation of Atwater's interest or estate, which was void in law."

After a very full discussion of the authorities and the principles involved, the Supreme Court of Minnesota, Chief Justice Emmett writing the opinion, said: *"The state can never concede to Congress the right to prescribe to the actual purchaser of public lands within their limits, the mode, manner or time in which he shall enjoy the land purchased. The Federal Government may regulate the terms on which it will give land to the citizen, fix the price for which it shall be sold, and give preference to certain purchasers, but when the terms of the gift are complied with, or the purchase money paid, the gift or purchase is complete; Congress has then exhausted the power over the public lands reserved by the Constitution of the United States, and the sovereignty of the state immediately attaches.* As well might Congress entail the public lands, or regulate the law of their descent and alienation in terms, as to prohibit the purchaser from selling until he has received the patent, and then delay the issuing of the patent at pleasure. We do not think that Con-

gress so intended to legislate, and even if the Act of September 4, 1841, had in plain terms prohibited the transfer of the lands instead of the mere right of pre-emption, until after the patent has issued, we are not yet prepared to regard such a prohibition as binding.

"The United States has but a proprietary interest in the public lands within the several states; the sovereignty is in the states. The rights attaching to the interest do not differ from those of any other landholder in the state, except as provided by the Constitution of the United States and the terms of the compact between the general and state governments at the time the state is admitted into the Union. The Constitution merely asserts the right to dispose of, as proprietor, and to make needful rules and regulations necessary to the exercise of that right. But the right to dispose of does not include the right to limit the enjoyment after sale nor to prescribe how or when the purchaser shall dispose of his land; and the right to make needful rules and regulations is such only as may be exercised by every proprietor."

In this connection we ask the Court's consideration of the case of Dunklin County v. the District County Court of Dunklin County, 23 Missouri Reports, pages 449-456. This was an application for a mandamus to be directed to the District County Court to show why a former order directing the sale of certain swamp and overflowed lands to the Cairo

& Fulton Railway Company, in payment of the subscription of capital stock of said company, should not be vacated. The case went off, of course, upon refusal of the Court to grant the mandamus because it was not the proper remedy, but Judge Leonard, in deciding the case, met squarely the proposition relied upon by the defendant—that the county had the right to sell the swamp lands for the purposes indicated, notwithstanding that the Act of Congress, September 28, 1850, granting the lands to the State of Arkansas, contained a provision that the proceeds of said lands shall be applied exclusively to the purpose of reclaiming said lands by the means of levees and drainage. The petitioner claimed:

"The Act of Congress is not simply a grant coupled with a trust addressed to the conscience of the grantee. It is a grant with legislative provisions as to the disposition of the thing granted."

Answering this contention, the Supreme Court of Missouri says:

"By the Act of Congress of 28th September, 1850 (9 U. S. Stats. 519), the terms of the grant to the State of Arkansas are, 'to enable the State of Arkansas to construct the necessary levees and drains to reclaim the swamp and overflowed lands therein,' and, by a subsequent section of the same Act, it is declared that the provisions of the Act are extended to every other state in which such lands may be found. The original grant, made by the state to the counties, was in order to execute this trust, and it is

supposed that the trust is fastened upon the lands, so that they cannot be disposed of by the state for any other purpose. *This, however, is not correct; the trust reposed by the United States is in the State of Missouri; it is a personal trust in the public faith of the state, and not a property trust, fastened by the terms of the grant upon the land itself, and following it into whose hands soever it may pass.* It is proper, however, here to remark, in vindication of the state, that the original grant by the United States contemplates, of course, a sale of the land, in order to render it available for the purposes of the trust, and it is not to be supposed that this state will be guilty of a breach of her good faith by applying the stock for which the land is sold to any other purpose, without the consent of the United States. *But however that may be, it is a matter exclusively within the control of the Legislature.*"

In Seymour v. Sanders, 3 Dillon, 437, 440, Judge Dillon says:

"Thus the plenary power of Congress over the disposition of the public lands within the state is expressly recognized to exist by the organic law of the state; and we hold that Congress may dispose of them at such time, in such manner, and for such purposes as in its judgment it may deem best.

"The title to all public lands must pass and vest according to the laws of the United States (Wilcox v. Jackson, 13 Pet. 498, 517). And, undoubtedly, it is true as a general proposition, that after the title

has passed from the United States, and is fully vested in purchasers from it, the land becomes subject to state legislation, and the power of the general government with respect to it ceases, except so far as it is otherwise lawfully provided in the Act by which Congress disposes of the land."

In Wilcox vs. McConnel, 13 Pet. 498, 516, Mr. Justice Barbour, announcing the unanimous opinion of the Court, says:

"We hold the true principle to be this, that whenever the question in any court, state or federal, is, whether a title to land which had once been the property of the United States has passed, that question must be resolved by the laws of the United States; but that whenever, according to those laws, the title shall have passed, then that property, like all other property in the state, is subject to the state legislation; so far as that legislation is consistent with the admission that the title passed and vested according to the laws of the United States."

This is a grant *in præsenti*. When the road was completed and accepted, the grant took effect, as of April 3, 1869, the date of the Act. The complete title passed to the State of Oregon; the issuance of the patents had nothing to do with the passing of the title. Not an acre of this land was sold by the Coos Bay Wagon Road Company until the road was completed and accepted. When the title therefore vested in the State of Oregon, its future disposal, in the language of Mr. Justice Barbour, in Wilcox v. Mc-

Connel, *supra: "Like all other property in the state, is subject to the state legislation."* In the Mills County case, 107 U. S., and Hager v. Reclamation District, 111 U. S. *supra,* the same doctrine is held, applied, however, to a different situation. In those cases, the controversy was over the disposition of the funds arising from the sale of swamp lands. The Supreme Court held in both cases that the state, having sold the land, the Government had no authority to follow the proceeds, although the grant was made upon condition that the proceeds should be used for a specific purpose. Counsel suggests a distinction between those cases and the one at bar, because the Government, in the swamp land cases, confessedly had a right to sell the lands and the dispute was about the application of the proceeds. But the principle underlying the decision in both the cases cited is exactly the same principle that we are invoking here. Here, as there, the state had a right to sell. In those cases the limitation was upon the *use* of the proceeds; here the limitation concerned the *amount* of the proceeds. The reasons which moved the court in the Mills case and Hager v. Reclamation District were, that the land had passed beyond the control of the Government, and: "Like all other property in the state is subject to the state legislation."

While a President's message is not "authority" in the sense in which that word is used by lawyers in briefs, yet it may contain matter persuasive in

the determination of a law question in court. For this reason we call the Court's attention to the Veto Message of President Buchanan, February 24, 1859, vetoing—

"An Act donating public lands to the several states and territories which may provide colleges for the benefit of agricultural or mechanical arts."

This message is found in Vol. 5, "Messages and Papers of the Presidents," on pages 543 to 550. We quote from page 546:

"The Federal Government, which makes the donation, has confessedly no constitutional power to follow it into the states and enforce the application of the fund to the intended objects. As donors we shall possess no control over our own gift after it shall have passed from our hands. It is true that the State Legislatures are required to stipulate that they will faithfully execute the trust in the manner prescribed by the bill. But should they fail to do this, what would be the consequence? The Federal Government has no power, aud ought to have no power, to compel the execution of the trust. It would be in as helpless a condition as if, even in this, the time of great need, we were to demand any portion of the many millions of surplus revenue deposited with the states for safe-keeping under the Act of 1836."

Mills County v. R. R. Co., 107 U. S. 557, 566.
Hagar v. Reclamation District, 111 U. S. 701, 712.

Emigrant Co. v. County of Adams, 100 U. S. 61, 69.

Cook County v. C. C. Canal etc. Co., 138 U. S. 635, 655.

U. S. v. Des Moines etc. Co., 142 U. S. 510, 541.

McNee v. Donahue, 142 U. S. 587, 602.

Chandler v. C. & H. Min. Co., 36 Fed. 665, 667.

U. S. v. Louisiana, 127 U. S. 182, 187.

CONCLUSION.

This is defendant's case, and it remains but to consider some general statements in the bill and claims made by the Government in the court below, and which will likely be made here, and answer them.

Allegations of Fraud Disproved by the Testimony.

The complaint in this suit was drawn because of false information of some kind communicated to the Assistant Attorney General who prepared it. One of the principal allegations in support of the plea for forfeiture is found on page 19 of the bill and is as follows:

"The alleged indebtedness secured by said mortgages was fictitious, feigned and untrue, and represented simply the interest of the stockholders, or certain thereof, of said Oregon Southern Improvement Company. Said mortgages executed and delivered to said Boston Safe Deposit and Trust Company as aforesaid were executed, delivered and foreclosed and caused to be executed, delivered and foreclosed

by the officers, stockholders and owners of said Oregon Southern Improvement Company with the intent and in the hope that by the aforesaid foreclosure sale the aforesaid restrictions upon the sale and disposition of said granted lands established by the terms of said Act of Congress approved March 3, A. D. 1869, might be evaded and defeated, and that the rights of your orator in the premises might be hindered, impaired and destroyed, and that the aforesaid conditional estate created by said Act of Congress approved March 3, A. D. 1869, might be converted into an unconditional estate for the use and benefit of the said officers, stockholders and owners of said Oregon Southern Improvement Company."

This did well enough to put in the bill, but in the taking of testimony the Government totally abandoned it, and the defendant has established its falsity beyond any question or doubt. Every witness (Crapo, Rotch, Yoakam, Shine) who had any knowledge on the subject testifies that the allegation is unfounded and that the mortgage was given in good faith and for an honest debt, and the foreclosure was also in good faith. And every letter, account, memorandum and statement, by whomsoever written or made during the years when this Oregon Southern Improvement Company was trying to weather the financial storm, shows that the company was insolvent and the mortgage was genuine and the foreclosure honest.

Section VI of the Act.

It was claimed on the trial that, "The granting act imposed upon the State the duty of selling the land. If it had not been for Section 6 there would have been no authority to make the transfer to the Wagon Road Company, but this authority was not extended by the section or otherwise."

We are unable to understand what this means or can mean. Section 6 gives no authority to do anything. It certainly didn't "impose upon the State" the duty of selling the land. As Judge Bellinger says in Nichols v. Southern Oregon Co., 135 Fed. 234: "The grant was not a law for the sale of the granted lands. It did not offer them for sale." It is a direction to the Surveyor General to survey the lands at as early a period as practicable "after said State shall have enacted the necessary legislation to carry this act into effect." The "necessary legislation" referred to in Section 6 is clearly the legislation suggested in Section 3, that "said road shall be constructed with such width, gradation and bridge as to permit of its regular use as a wagon road and in such other special manner as the State of Oregon may prescribe."

No Notice to Government of Pretended Breach of Condition Prior to 1908.

It was claimed at the trial that, "The proof fails to show that any notice of the violation was brought, in any form, to the attention of Congress before the introduction of the joint resolution authorizing the

commencement of this suit." We might add to this that the proof does show that the only complaint that was ever made by anybody to Congress, or to any officer of the Government, was made by this defendant through its attorneys, asking the Attorney General *to do something* to clear up defendant's title. At the hearing before the committee, beginning March 12, 1908, Elijah Smith, president of the defendant company, testifies that the controversy over the title had so clouded it that it became necessary for something to be done, and that he requested his attorneys to write the Attorney General, which they did. This letter is in the Government's possession and as far as this testimony shows, and as far as we know, it is the only complaint in any shape that was made to the Government concerning this grant.

On this point we ask the Court's attention to the record of land grant forfeitures by Congress and in the courts. Up to the entry of judgments in this Court, in the O. & C. Case, 186 Federal, *there never was a land grant forfeited except for non-completion of the road in aid of which it was made. Failure to construct* was the only ground that was ever recognized as sufficient to justify a forfeiture. We will not encumber this brief with a list of these cases; they are all set out in an official book printed by authority of Congress and entitled, "Statement showing land grants made by Congress to aid in the construction of railroads, wagon roads, canals and internal improvements, together with the data rela-

tive thereto. Compiled from the records of the General Land Office by the order of the Secretary of the Interior." This book was filed with the Court in the O. & C. case.

The Debates in Congress.

Importance seems to be attached to what was said by members of Congress at the time of the passage of the act. These debates settle nothing, as is held by the Supreme Court in many cases. In United States v. Freight Association, 166 U. S., pages 318 and 319, the Court said:

"There is, too, a general acquiescence in the doctrine that debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body. United States v. Union Pacific Railroad Company, 91 U. S. 72, 79; Aldridge v. Williams, 3 How. 9, 24, Taney, Chief Justice; Mitchell v. Great Works Milling & Manufacturing Company, 2 Story, 648, 653; Queen v. Hertford College, 3 Q. B. D. 693, 707.

"The reason is that it is impossible to determine with certainty what construction was put upon an act by the members of a legislative body that passed it by resorting to the speeches of individual members thereof. Those who did not speak may not have agreed with those who did; and those who spoke might differ from each other; the result being that the only proper way to construe a legislative act is from the language used in the act, and, upon occasion, by a resort to the history of the times when it

was passed. (Cases cited, *supra.*) If such resort be had, we are still unable to see that the railroads were not intended to be included in this legislation."

Even if this were not so, the Congressional debates on this grant do not aid the Government in its present contention. When the bill was first passed by the Senate, this clause we are now considering was not in the bill. When it reached the House, Julian proposed it, and then for some reason changed his mind and said he would amend his amendment. He was granted leave to do so and presumably drafted the amendment as it now appears. The suggestion that perhaps somebody surreptitiously interfered with it is not borne out by the records and there is no foundation whatever to sustain it. Mr. Mallory, on the floor of the House, told Congress that the lands could not be sold for a cent an acre: "A large portion of the land proposed to be granted is not worth anything. Most of it lies on this range of mountains and could not be sold for one cent an acre." And that is why the "actual settler" provision was left out.

Government's Position as to Bona Fide Purchaser.

It is claimed by the Government that however innocent we may be *in fact,* we cannot be held innocent *in law,* because of certain *presumptions* and notice contained in the patents. But this is not sound. As to the recitals in the patents, it may be noted that no reference whatever is made in the patent to

this so-called limitation on the grant. The patents are straight-out patents conveying a complete title. The same is true of the recorded instruments pleaded in the bill, and it is claimed that we are chargeable with a knowledge that no one else ever apparently had.

On November 22, 1880, Judge Deady decided the case of the Coos Bay Wagon Road Co. against Crocker, and it is stipulated that this record may be considered in evidence. It would be so anyway, as the opinion is published in 6 Sawyer, pages 574 to 584. The claim of the Coos Bay Wagon Road Co. was based upon the sale made by that company to Miller and by Miller to Stanford, Huntington and Hopkins, etc., as pleaded in the bill herein, and the suit was to enforce a vendor's lien on account thereof. The Court granted the relief prayed for. If everybody connected with this grant knew in 1875 of this pretended "condition," as counsel wants this Court to understand, it is curious that Judge Deady did not know it as late as 1880. The fact is that nobody knew or pretended to know any such thing. The parties in that suit were represented by able counsel and a large amount of money was involved. Crocker was resisting the payment and was using every means to avoid complying with the contract. It did not occur to him nor to his attorneys, nor to Judge Deady, that this contract was in violation of law and could not be enforced. And during all the time that elapsed since the decision in 6 Sawyer to the decision in 135 Federal, Nichols v. S. O. Co., neither the Government nor anyone else pretended that there

was any limitation in the grant affecting title to these lands, *after completion of the road and acceptance by the State.*

"Policy" of the Government.

Notwithstanding that the grant involved here does not contain any provision for "actual settlers" or "actual settlement," it was claimed in the lower Court and will be here that there is some "fixed policy" of Congress with reference to land grants. But this is not controlling and cannot be, even if there *were* any well-defined policy moving to the accomplishment of a certain result. In the case of Haddon v. the Collector, 5th Wall. 107, 111, Mr. Justice Field, announcing the opinion in Court, said: "What is termed the 'policy of the Government' with reference to any particular legislation is generally a very uncertain thing upon which all sorts of opinions, however varying from the other, may be formed by different persons. *It is a ground much too unstable upon which to rest the judgment of the Court in the interpretation of statutes.*"

But outside of this, there is no such policy. Nearly all the lands in Oregon contiguous to the territory involved in this suit, which were taken up in the last twenty-five years, were taken under the Timber and Stone Act, and that act does not provide for settlement. The School Section Act of Congress does not provide for settlement; neither the Swamp Land Act, or Salt Marsh, or Tide-Land Acts; neither the act for interior improvements nor the Agricultural

College Act provide for settlement. The other wagon road grants, Dalles Military, Willamette Valley and Cascade Mountain, Oregon Central Military (all Oregon roads) do not provide for settlement. This suit was not brought because of that "policy" or any "policy." It is, as everybody in this territory knows, but the aftermath of the "land fraud trials." About the year 1902 there was inaugurated an investigation of the method by which the public lands in Oregon had been disposed of *under the Timber and Stone Act and the Homestead Law.* The investigation had nothing to do with this grant. As a result of this and the subsequent disclosures with their consequences, the public mind in Oregon became inflamed upon the subject of land tenures and land grants. And the legislature of 1907, following in the wake of all this clamor and disturbance, memorialized Congress—*not* to *forfeit this grant* nor any grant,—but "to enact such laws and take such steps, by resolution or otherwise, as may be necessary to compel said railroad company (O. & C. R. R. Co.) to comply with the conditions of said grant." (Session Laws, Oregon, p. 517.) This memorial referred to the *Oregon & California grant only.*

It did not enter into the mind of anyone that *this* grant was to be forfeited. Nobody wanted it forfeited. The only people interested in the resolution of Congress or in obtaining the relief that the resolution called for were, first, misguided individuals who thought *they* would get the lands at $2.50 per

acre. Second, large timber holders who were not misguided, but who hoped that the result would be to tie up these lands in forest reservations so that nobody could get them and they, the timber holders, would eventually be the beneficiaries of the legislation, because they were the only ones who could buy the timber. Although this matter was fully investigated by a committee of Congress, who took a year in the examination, Congress refused to declare a forfeiture of these lands or any of them, or even of the railroad lands, and so expressly declared in the resolution under which this suit is brought. If Congress, after all this investigation, refused to declare the forfeiture, it is reasonable to presume that they thought they had no right to do it. And why should it be done at all here, or anywhere? What call is there now to set in motion the machinery of a Court of Equity to cancel this grant and deprive the defendant of the property which it bought in good faith, relying upon similar good faith on the part of the Government? Forty-seven years have elapsed since this grant was made. The road was built in strict accordance with the terms of the grant. It was accepted by the Government. Every acre of this land was earned and honestly earned. Patents were issued by the Government after full knowledge that the State had transferred the grant to the Coos Bay Wagon Road Company. As early as 1880 the whole matter was litigated in this Court in the case of Crocker v. Coos Bay Wagon Road Co., 6 Saw. page 574. Nobody up to that time ever pretended that

there was any flaw in the title, or limitation upon the right of the Coos Bay Wagon Road to sell these lands. The four suits, Defendant's Exhibits 240, 241, 242, 243, were brought by the Government to cancel different portions of the grant. The defendants informed the Government of their rights and pleaded in one of the suits every single fact pleaded in this suit. This was in 1896. Subsequently Nichols, representing a syndicate of speculators, brought his suit against this defendant and his complaint was dismissed and the reasons are set out by Judge Bellinger, 135 Federal, page 233. In the administration of this property—in providing for its up-keep and fixed and overhead charges, the defendant has expended of its own money $691,696.52 more than it has received, and this not taking into consideration the original cost when it was purchased in 1888—in the neighborhood of $100,000. It is no longer a question of splitting hairs over a technicality, as to whether the proviso in the grant creates a "condition" or is merely a "covenant." It is a question of common honesty between man and man. Government should not be permitted to do a thing which, if done by a private individual, would bring down upon him the contempt of his fellows and the condemnation of every decent, right-thinking man. Judge Gilbert voiced this thought in different language but with equal force when he said in 54 Federal, 811: *"But when matter of estoppel arises the observances of honest dealing may become of higher*

importance than the preservation of the public domain."

And why all this contention over what was done, or was not done, by the Oregon Southern Improvement Company, or this defendant? This is not a condition or covenant "running with the land." If the Government has any case here it is because of what the Coos Bay Wagon Road Company did or did not do. If the Coos Bay Wagon Road Company had a right to sell, as it did sell, the Government has no case. If it had no right to make the sales it did make, and if the sale to Miller was a breach of condition or violation of a covenant, the Government's right to proceed arises out of that sale and not out of anything that was done thereafter.

The whole claim that the present litigation about this grant is in the interest of "settlers" or "actual settlers" or to promote "settlement of the land" is the merest pretense—and is unworthy of the Government. The Government itself hasn't followed any such pretended "policy," as clearly appears from the provisions of the Timber and Stone Act. It does not intend to follow any such "policy" now, with reference to these lands, if it gets them. They are the same character of lands as the O. & C. lands. The O. & C. grant, in fact, lies right across these lands, as shown in the record of the case, Exhibit 242, *supra.* What "policy" of settlement does the Government intend to follow in regard to these railroad lands? On August 20, 1912, Congress passed the Act commonly called the "Innocent Purchasers' Act."

Section 2 of that Act reads as follows: "That none of the lands reverted to the United States by virtue of any right to forfeiture thereto as aforesaid shall be or become *subject to entry under any of the public-land laws of the United States, or to the initiation of any right whatever under any of the public-land laws of the United States.*"

What sham this all is. The Government is complaining here that we did not sell the land—that we *"retarded the development of the country,"* as they put it. Well, we did sell some land. We sold what we could sell. We did not sell any more because we could not sell—nobody would buy and we could not *make* them buy. What remedy is proposed by the Government to stop us from further "retarding the development of the country"? Why, since nobody would buy heretofore, when they *might*—hereafter *they shall not be permitted to buy at all*—even if they want to. And the decree in this case is in accordance with that suggestion.

This suit should be dismissed. There is no equity in the bill. It is based upon a false notion as to the facts. The Attorney General or whoever drafted it entertained the erroneous opinion that there was initial fraud in the execution of the mortgage to the Boston Safe Deposit & Trust Co. and in its foreclosure. This claim is practically abandoned on the trial, and the testimony shows it has no merit. No other charge of fraud or suggestion of fraud is made in the bill or the proof. No reason whatever is given by the Government for asking that the title to these

lands be forfeited, except the naked syllogism:

a. Where a grant is upon condition subsequent and there has been a breach, it *may be* forfeited.

b. This is a grant upon condition subsequent and there has been a breach.

c. Therefore this grant *must* be forfeited.

The *non sequitur* in this "argument" is apparent; the error is fundamental and pervades the Government's entire case.

This suit is not on the law side of the Court, where hard and fast rules of procedure sometimes fetter the conscience and obstruct instead of aid in the administration of justice. We are in a higher forum—a Court of conscience where the answer to but one question will shape the Court's ultimate decision: *"Is this demand honest?"*

"A Court of Equity can act only on the conscience of a party. If he has done nothing that taints it no demand can attach upon it so as to give any jurisdiction." (Sug. Vend.)

Respectfully submitted,

DOLPH, MALLORY, SIMON & GEARIN,
Solicitors for Defendant.

TABLE OF CASES—*Continued*

U.

TABLE OF CASES—*Continued*

V.

W.